No. 87-354-CSY
Status: GRANTED

Title: Arizona, Petitioner
v.
Ronald William Roberson

Docketed:
August 28, 1987

Court: Court of Appeals of Arizona,
Division Two

Counsel for petitioner: Ferg,Bruce M.

Counsel for respondent: Barrasso,Robert L.

Entry	Date	Note	Proceedings and Orders
1	Aug 28 1987	G	Petition for writ of certiorari filed.
2	Sep 29 1987		DISTRIBUTED. October 16, 1987
5	Oct 2 1987		Order extending time to file response to petition until October 28, 1987.
8	Oct 28 1987	X	Brief of respondent Ronald William Roberson in opposition filed.
9	Oct 28 1987	G	Motion of respondent for leave to proceed in forma pauperis filed.
6	Nov 4 1987		REDISTRIBUTED. November 25, 1987
11	Nov 30 1987		REDISTRIBUTED. December 4, 1987
12	Dec 7 1987		Motion of respondent for leave to proceed in forma pauperis GRANTED.
13	Dec 7 1987		Petition GRANTED.
			**********
14	Jan 4 1988	G	Motion of respondent for appointment of counsel filed.
16	Jan 4 1988	G	Motion of petitioner to dispense with printing the joint appendix filed.
15	Jan 11 1988		DISTRIBUTED. January 15, 1988. (Motion of respondent for appointment of counsel).
19	Jan 14 1988		Brief amici curiae of Americans for Effective Law Enforcement, Inc., et al. filed.
17	Jan 19 1988		Motion for appointment of counsel GRANTED and it is ordered that Robert L. Barrasso, Esquire, of Tucson, Arizona, is appointed to serve as counsel for the respondent in this case.
18	Jan 19 1988		Motion of petitioner to dispense with printing the joint appendix GRANTED.
20	Jan 20 1988		Brief of petitioner Arizona filed.
22	Jan 21 1988		Brief amici curiae of Indiana, et al. filed.
21	Jan 22 1988		Brief amicus curiae of United States filed.
23	Feb 4 1988	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
24	Feb 5 1988		SET FOR ARGUMENT, Tuesday, March 29, 1988. (4th case).
25	Feb 11 1988		Record filed.
		*	Certified copy of original record received.
26	Feb 22 1988		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
27	Feb 23 1988		CIRCULATED.
28	Mar 18 1988	X	Reply brief of petitioner Arizona filed.
29	Mar 29 1988		ARGUED.

87-354

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

THE STATE OF ARIZONA,

Petitioner,

vs.

RONALD WILLIAM ROBERSON,

Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

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QUESTION PRESENTED FOR REVIEW

IS THE RULE OF EDWARDS V. ARIZONA THAT POLICE OFFICERS MAY NOT INITIATE INTERROGATION OF AN IN-CUSTODY SUSPECT APPLICABLE TO A CASE WHERE THE SUSPECT, HAVING INVOKED HIS RIGHTS IN REGARD TO A CRIME THEN UNDER INVESTIGATION, LATER CONSENTS TO QUESTIONING ABOUT AN UNRELATED CRIME, CONDUCTED BY OTHER OFFICERS WHO ARE IGNORANT OF THE PRIOR INVOCATION OF RIGHTS AND WHO COMPLY COMPLETELY WITH THE REQUIREMENTS OF MIRANDA V. ARIZONA?

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After a suppression hearing the trial court ruled that the police had obtained statements from Roberson in violation of State v. Routhier, 137 Ariz. 90, 669 P.2d 68 (1983), so the statements could not be used by the prosecution during its case-in-chief. Routhier purports to apply Edwards v. Arizona, 451 U.S. 477 (1981). The State appealed this ruling to Division Two of the Arizona Court of Appeals, but the State's claims were rejected in an unpublished Memorandum Decision, State v. Roberson, 2 CA-CR 4474-5 (Ariz.Ct.App., Mar. 19, 1987). The State then petitioned for review by the Arizona Supreme Court, but such review was denied by order on June 30, 1987. The Memorandum Decision and the order are reproduced in the Appendix.

JURISDICTION OF THIS COURT

The action of the Supreme Court of Arizona denying review of the proceedings

below occurred on June 30, 1987 and was reflected in a written notice dated July 1,1987. No rehearing was requested. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 20.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT V.

No person ... shall be compelled in any criminal case to be a witness against himself ... .

AMENDMENT VI.

In all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defense.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This litigation actually involves two wholly separate criminal cases. The present one, Pima County No. CR-16041, concerned a charge that Roberson burglarized a home on April 15, 1985, and stole certain property belonging to Kenneth Baarson. (Record on Appeal, hereafter referred to as R.O.A., at 1.) That same day, April 15, Detective Jerry Cota-Robles of the Burglary Division of the Tucson Police Department received information from a witness to that burglary, describing both a suspect and his vehicle, including a Montana license number. (R.T. of April 3, 1986, at 3-7, 15-16.) On April 18, he called the Major Offenders Unit of the Tucson Police Department to alert them about the suspect vehicle. (Id. at 7-8.) The person with whom he spoke, Det. Barbara Wright, recognized the vehicle description and told Cota-Robles that a subject had recently been arrested in that car for doing another burglary. (Id. at 8-9, 17.)

Cota-Robles therefore contacted the case

officers on the case in which the arrest had been made, Detectives Quinn and Thorson, and arranged to go out with them to question the arrestee, Ronald Roberson, on April 19. (Id. at 9-10.) Cota-Robles was unaware whether Roberson had been questioned before, and no one mentioned any assertion of rights having occurred. (Id. at 10-11, 18.) At the jail Cota-Robles informed Roberson of his rights and Roberson indicated understanding of them, so the detective turned on the tape recorder, advised Roberson of his rights once more, and proceeded with Det. Quinn to question him about the April 15 burglary. (Id. at 10-15, 18-20.) Roberson never said anything about wanting an attorney. (Id. at 19.) The resulting taped statement amounted to a full confession of the April 15 burglary.

The wrinkle develops in this seemingly routine case because of a problem in the other case, CR-15268. It seems that when Roberson was arrested on April 16, he was warned of his rights by an officer named

Perez, and stated that he wanted an attorney; however, when he was approached a few minutes later by a different officer (Garrison), who didn't know of the invocation to Perez, Roberson agreed to talk, and gave statements to Garrison, Quinn, and Wright. (R.O.A. at 106-07; R.T. of April 3, 1986, at 23-27, 40-41.) Those statements were suppressed in CR-15268, to the extent that they could be used only in cross-examination, not in the state's case-in-chief. (R.O.A. at 107; R.T. of April 3, 1986, at 27.) The defense in the present case requested that Roberson's statements given on April 19 be similarly suppressed, on the basis of Edwards v. Arizona and State v. Routhier, supra. (R.O.A. at 106-09.)

The defense agreed that the various officers other than Perez would all testify that they were unaware of Roberson's invocation of the right to counsel made to Perez at the time of arrest on April 16. (R.T. of April 3, 1986, at 52.) The trial

court also found as a matter of fact that there was no connection at all between the April 16 violation and the April 19 questioning. (Id. at 50-51.) Nonetheless, the trial court felt itself bound by Routhier to grant the motion to suppress, to the extent that the confession could not be used in the state's case-in-chief. (Id. at 43-46.) The prosecutor therefore was permitted to dismiss the case without prejudice in order to appeal the suppression motion. (Id. at 60-61.)

The Court of Appeals affirmed the suppression order. It noted that no Fifth Amendment decision by this Court had addressed the issue of interrogation initiated by the police about a second, unrelated, case after invocation of the right to counsel had occurred in the original case, and since it did not believe that this Court's recent Sixth Amendment decisions had any application, it followed the Routhier rule that such questioning is a violation of Edwards. The State petitioned

the Arizona Supreme Court for review on the basis that the Routhier rule was an unjustified expansion of Edwards which contradicted a variety of this Court's more recent decisions, but the petition was denied. Thus, the Court is presented with a federal issue which has been litigated at every stage of the proceedings below (though the handling of it by the Arizona appellate courts was inappropriately perfunctory), so the question is properly before it.

REASONS FOR GRANTING CERTIORARI

A. The Routhier/Roberson rule is not required by Edwards v. Arizona, and Arizona's use of Routhier places it in conflict with the interpretations of Edwards followed in a number of other states.

The Arizona Court of Appeals upheld the granting of the suppression motion in this case on the basis of the Arizona Supreme Court's decision in State v. Routhier, 137 Ariz. 90, 669 P.2d 68 (1983). Routhier, which bans any police-initiated interrogation of an arrestee who has invoked his right to counsel, even if that interrogation is wholly unrelated

to the charge on which the person invoked his rights, purports to be nothing more than an application of Edwards v. Arizona, 451 U.S. 477 (1981). However, Routhier plainly goes far beyond Edwards. Edwards involved a reinterrogation about the same crime as to which the defendant had invoked counsel; to extend it to preclude questioning about wholly unrelated offenses is to take it beyond both its logic and its facts. In the past this Court has cautioned against expanding "currently applicable exclusionary rules by erecting additional barriers to placing truthful and probative evidence before state juries...." Lego v. Twomey, 404 U.S. 477, 488-89 (1972). That, however, is precisely what the Routhier/Roberson rule does -- expand the Edwards exclusionary rule into an area not clearly contemplated by that decision.

Judge Learned Hand warned that, "The suppression of truth is a grievous necessity at best, more especially when as here its inquiry concerns the public interest; it can

be justified at all only when the opposed private interest is supreme." McMann v. Securities and Exchange Commission, 87 F.2d 377, 378 (2d Cir. 1937), cert. denied, 301 U.S. 684. That there is such a "supreme" interest in precluding voluntary confessions because of an invocation of rights in a wholly separate investigation is far from self-evident. Indeed, the appellate courts in a number of jurisdictions have concluded (many of them post-Routhier) that Edwards does not bar questioning about unrelated offenses. See Lofton v. State, 471 So.2d 665 (Fl.App. 1985), rev. denied, 480 So.2d 1294; State v. Harriman, 434 So.2d 551 (La.App. 1983); supervisory writ denied, 440 So.2d 551 (La. 1983), cert. denied, 106 S.Ct. 1958 (1986); State v. Dampier, 333 S.E.2d 230 (N.C. 1985)(notes but declines to follow Routhier); State v. Newton, 682 P.2d 295 (Utah 1984); McFadden v. Commonwealth, 300 S.E.2d 924 (Va. 1983); State v. Cornethan, 684 P.2d 1355 (Wash.App. 1984); cf. State v. Taylor, 643 P.2d 379, 382

(Or.App. 1981) (assumes without deciding that custodial conversations after invocation of the right to counsel may be permissible if concerned with matters unrelated to the one on which the right was invoked); People v. Warner, 146 Ill.App.3d 370, 496 N.E.2d 1010 (1986) (knowledge of invocation of right to counsel to F.B.I. during questioning will not be imputed to Chicago police who subsequently questioned defendant about same crime, so statements admissible despite Edwards). The Routhier/Robeıson approach not only extends the reach of Edwards beyond its original intendment, but in doing so conflicts with holdings from a substantial number of other jurisdictions. Such a conflict is one of the factors listed in Supreme Court Rule 17.1 as indicating that this Court should seriously consider granting certiorari.

B. This Court's on-going merger of Fifth and Sixth Amendment principles shows that Edwards should not be applied to bar police-initiated interrogation on a case concerning which the arrestee has not invoked counsel.

Assuming that the decisions in Edwards and its progenitor, Miranda v. Arizona, 384 U.S. 436 (1966), are indeed the foundation on which Routhier/Roberson rests, the question immediately arises whether or not that foundation has so shifted that the superstructure must collapse. Earlier Supreme Court cases, including Miranda and Edwards, attempted to maintain some distinction between a Fifth Amendment right to counsel at interrogation (which those cases protect), and a Sixth Amendment right to advice of counsel triggered by institution of the accusatory process, as in Massiah v. United States, 377 U.S. 201 (1964). However, even the Edwards court found support for its holding in Sixth Amendment decisions. (See 451 U.S. at 484, n. 8.) Whatever viability the Fifth Amendment/Sixth Amendment distinction may have previously possessed appears to have been wiped out in Michigan v. Jackson, ___ U.S. ____, 106 S.Ct. 1404 (1986). If a complete wall of separation between Fifth

and Sixth Amendment analysis really existed, Jackson could not have been decided as it was. The facts in Jackson revolved around a plain Sixth Amendment right to counsel after arraignment, but the argument for exclusion was based on Miranda and Edwards, which purport to rest on the Fifth Amendment. Nonetheless, and in the face of a vigorous dissent, this Court treated a request for counsel at arraignment as being identical in effect to a request for counsel during questioning under Edwards. This clearly indicates that Sixth Amendment cases have significance in applying Edwards.

This meshing of the two approaches is important to the present case, because of two other new Sixth Amendment decisions. In Maine v. Moulton, ___ U.S. ___, 106 S.Ct. 477 (1985), the question was admissibility of statements made to an informer. This Court held that statements about charges on which the defendant already had been indicted had to be excluded, because obtaining them violated the right to

counsel, but statements on new charges, where the right to counsel had not attached, were admissible:

> [To] exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities. Consequently, incriminating statements pertaining to pending charges are inadmissible at the trial of those charges, not withstanding the fact that the police were also investigating other crimes, if, in obtaining this evidence, the State violated the Sixth Amendment by knowingly circumventing the accused's right to the assistance of counsel.[16]

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[16] Incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses.

(106 S.Ct. at 489-90; emphasis added.)

Thus, statements concerning different offenses were specifically held subject to differing treatment, even when developed simultaneously by one person in the course of a single investigation. A fortiori,

statements about different offenses, developed at different times, by different investigators, in the course of two wholly independent investigations, should not be treated the same. Inasmuch as there was no nexus whatever between the statements given in this case and the statements given in the case on which Roberson was originally arrested and interrogated, the statements offered in this case should be examined by themselves. Since there was no involuntariness or failure to comply with Miranda and Edwards in this investigation, the statements given should be entirely admissible. This is especially true because there was no knowing circumvention of Roberson's right to counsel; on the contrary the police followed Miranda to the letter and had no idea that the right to counsel had been invoked.

This conclusion is reinforced by Moran v. Burbine, ___ U.S. ____, 106 S.Ct. 1135 (1986), which held that a confession is admissible, even if the defendant's lawyer

is not permitted to contact the defendant, when the defendant makes an otherwise voluntary and intelligent rights waiver. Moran points out that society has a "compelling interest" in obtaining confessions from lawbreakers; that the existance of a lawyer-client relationship on one charge does not create a Sixth Amendment right to the presence of counsel during interrogation on a different charge, and that the Miranda guarantee of the presence of counsel is triggered only by a request. (106 S.Ct. at 1144, 1146, and 1147, n.4.) Roberson thus had no right to counsel already operative when the detectives approached him about the present case. To be protected he had to invoke the right, which he failed to do, so his statements are completely admissible.

No United States Supreme Court case has dealt with renewed interrogation about crimes unrelated to the one which was in focus when the defendant invoked his right to counsel. The one decision to examine

renewed questioning on an unrelated offense is Michigan v. Mosley, 423 U.S. 96 (1975), and there the resultant admissions were held to be admissible. However, because Mosley involved the right to silence rather than the right to counsel, many courts (including the Arizona Supreme Court, in Routhier) concluded that the procedures Mosley laid down do not apply to situations like the one here. Michigan v. Jackson, Maine v. Moulton and Moran v. Burbine have drawn Fifth and Sixth Amendment analyses close together, and plainly indicate that counsel rights attaching to a defendant on one charge do not bar questioning on unrelated charges, anymore than the right to silence invoked on the first charge barred questioning about the second unrelated charge in Mosley. The theoretical underpinning for Routhier having been dissolved by the subsequent decisions just discussed, it should be explicitly laid to rest -- that a lower court has decided an important issue of federal law which has not

yet been settled by this Court, or has decided a federal issue in a way which conflicts with applicable decisions of this Court, is yet another basis under Rule 17.1 for granting certiorari.

C. The Routhier/Roberson approach offends the rationale behind the exclusionary rule.

Time and time again this Court has pointed out that the purpose of an exclusionary rule is to deter police misconduct, so that there is no reason to exclude reliable evidence of guilt where the police have acted in good faith. See, e.g., Illinois v. Krull, ___ U.S. ___, 107 S.Ct. 1160 (1987); Colorado v. Connelly, ___ U.S. ____, 107 S.Ct. 515 (1986); United States v. Leon, 468 U.S.897 (1984); United States v. Peltier, 422 U.S. 531 (1975); Michigan v. Tucker, 417 U.S. 433 (1974). In situations where this goal of deterrence is not substantially advanced by an exclusionary rule (which exacts high social costs such as interference with the truth-finding function, release of guilty

defendants, and generation of disrespect for the judicial system) the rule is not applied. It is undisputed that the police who questioned Roberson in jail did everything they were supposed to do under Miranda and had no knowledge of the prior invocation of rights. To exclude a completely voluntary statement obtained under such circumstances in the interest of some "bright line" rule of application of Edwards is a travesty of justice. Former Chief Justice Berger wrote, concurring in the judgment in Michigan v. Jackson:

> I concurred only in the judgment in Edwards v. Arizona, 451 U.S. 477, 487-488, 101 S.Ct. 1880, 1886, 66 L.Ed.2d 378 (1981), and in doing so I observed that:
>
> > "The extraordinary protections afforded a person in custody suspected of criminal conduct are not without a valid basis, but as with all 'good' things they can be carried too far."
>
> The urge for "bright-line" rules readily applicable to a host of varying situations would likely relieve this Court somewhat from more than a doubling of the Court's work in recent decades, but this urge seems to be leading the Court to an absolutist, mechanical treatment of the subject.

At times, it seems, the judicial mind is in conflict with what behavioral -- and theologicial -- specialists have long recognized as a natural human urge of people to confess wrongdoing. See, e.g., T.Reik, The Compulsion to Confess (1959).

We must, of course, protect persons in custody from coercion, but step by step we have carried this concept well beyond sound, common-sense boundaries. The Court's treatment of this subject is an example of the infirmity of trying to perform the rulemaking function on a case-by-case basis, ignoring the reality that the criminal cases coming to this Court, far from typical, are the "hard" cases. This invokes the ancient axiom that hard cases can make bad law.

> Stare decisis calls for my following the rule of Edwards in this context, but plainly the subject calls for re-examination. Increasingly, to borrow from Justice Cardozo, more and more "criminal[s] ... go free because the constable has blundered."

(106 S.Ct. at 1411.) In the present case the "constable" did not even "blunder", but meticulously conformed to the dictates of the law, and yet the Routhier/Roberson "bright-line rule" would free Roberson from facing his fully-warned, wholly voluntary statements. Such "absolutist, mechanical treatment of the subject" surely "calls for

re-examination".

D. <u>The Routhier/Roberson approach is inconsistent with the "independent source" doctrine</u>.

Another serious objection to the meat-ax <u>Routhier/Roberson</u> approach is its total failure to take into account another relevant principle, the "independent source" doctrine. While the history of this exception to the exclusionary rule reaches back to the genesis of the exclusionary rule itself, this Court recently recapitulated the doctrine in an extremely clear manner, and pointed out its applicability to both Fifth and Sixth Amendment violations, in a decision which bears quoting at length:

> The doctrine requiring courts to suppress evidence as the tainted "fruit" of unlawful governmental conduct had its genesis in <u>Silverthorne Lumber Co. v. United States</u>, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920); there, the Court held that the Exclusionary Rule applies not only to the illegally obtained evidence itself, but also to other incriminating evidence derived from the primary evidence. The holding of <u>Silverthorne</u> was carefully limited, however, for the Court emphasized that such information does not automatically become "sacred and

inaccessible." Id. at 392, 40 S.Ct. at 183.

> If knowledge of [such facts] is gained from an independent source, they may be proved like any others ...." Ibid. (emphasis added).

Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), extended the Exclusionary Rule to evidence that was the indirect product or "fruit" of unlawful police conduct, but there again the Court emphasized that evidence that has been illegally obtained need not always be suppressed, stating:

> "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" Id., at 487-488, 83 S.Ct., at 417 (emphasis added) (quoting J. Maguire, Evidence of Guilt 221 (1959)).

The Court thus pointedly negated the kind of good-faith requirement advanced by the Court of Appeals in reversing the District Court.

Although Silverthorne and Wong Sun involved violations of the Fourth Amendment, the "fruit of the poisonous tree" doctrine has not been limited to cases in which there has been a Fourth

Amendment violation. The Court has applied the doctrine where the violations were of the Sixth Amendment, see United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), as well as of the Fifth Amendment.[3]

The core rationale consistently advanced by this Court for extending the Exclusionary Rule to evidence that is the fruit of unlawful police conduct has been that this admittedly drastic and socially costly course is needed to deter police from violations of constitutional and statutory protections. This Court has accepted the argument that the way to ensure such protection is to exclude evidence seized as a result of such violations notwithstanding the high social cost of letting persons obviously guilty go unpunished for their crimes. On this rationale, the prosecution is not to be put in a better position than it would have been in if no illegality had transpired.

By contrast, the derivative evidence analysis ensures that the prosecution is not put in a worse position simply because of some earlier police error or misconduct. The independent source doctrine allows admission of evidence that has been discovered by means wholly independent of any constitutional violation. That doctrine, although closely related to the inevitable discovery doctrine, does not apply here; Williams' statements to Leaming indeed led police to the child's body, but that is not the whole story. The independent source doctrine teaches us that the interest of society in deterring unlawful police conduct and the public interest in having juries

receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position than they would have been in if no police error or misconduct had occurred. See Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52, 79, 84 S.Ct. 1594, 1609, 12 L.Ed.2d 678 (1964); Kastigar v. United States, 406 U.S. 441, 457, 458-459, 92 S.Ct. 1653, 1663-1664, 32 L.Ed.2d 212 (1972). When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation.

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3 In Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52, 79, 84 S.Ct. 1594, 1609, 12 L.Ed.2d 678 (1964), the Court held that a "state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him." The Court added, however, that "[o]nce a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." Id., at 79, n. 18, 84 S.Ct., at 1609, n. 18; see id., at 103, 84 S.Ct., at 1616 (WHITE, J., concurring). Application of the independent source doctrine in the Fifth Amendment context was reaffirmed in Kastigar v. United States, 406 U.S.

441, 460-461, 92 S.Ct. 1653, 1664-1665, 32 L.Ed.2d 212 (1972).

Nix v. Williams, 467 U.S. 431, 441-44 (1984) (all emphasis in original).

To suppress evidence which has no relation whatever to a prior police illegality is to effectively put the police in a worse situation than if there had been no error, and that, according to Nix v. Williams, is unacceptable. Routhier/Roberson plainly violates this altogether logical rule. The "independent source" doctrine applies to statements (whether of witness or suspects), not just tangible evidence. United States v. Ceccolini, 435 U.S. 268 (1977), and cases discussed therein. The questioning done by Detective Coto-Robles on April 19 concerning the April 15 burglary is obviously something that happened altogether independently of the improper resumption of questioning which occurred after the invocation of rights on April 16. No logic can justify suppression of the voluntary statements elicited at that

time, so Routhier/Roberson should be reviewed and overruled.

E. The Routhier/Roberson rule is unreasonable.

Routhier seems to hold that, once an accused invokes his right to counsel, he can never again be questioned until he is provided with a lawyer, regardless of subject matter. This rigid rule leads to absurd results. Suppose a defendant is arrested for and interrogated about Crime A, questioning ends when he invokes his right to counsel, and he is released on his own recognizance without ever seeing a lawyer. When he is later picked up and interrogated about Crime B (which has no nexus whatever with Crime A) by officers who know nothing about the invocation of counsel and have no interest in Crime A, Routhier as it now stands bars admission of statements about B, even in a trial on Crime B alone. This is a patently ridiculous result, which has no reasonable basis even in the prophylactic approach of Miranda and Edwards v. Arizona. Except that Roberson remained in

jail, his case is exactly like this hypothetical.

The Court of Appeals suggested that this argument construes Routhier too broadly, and that Roberson's continuing in custody was significant, because "The coercive environment never dissipated". (Slip Opinion at 3.) To so reason is to exchange the unmitigated fiction of a hypothetically coercive atmosphere for reality. Roberson had retracted his original invocation of counsel within minutes of having made it. He then was left alone for 3 days before being reapproached and rewarned of his rights, which he freely waived. He was questioned about wholly unrelated offenses, so there was no "cat out of the bag" psychological pressure. There was no intimidation, coercion, or deception by the police -- no physical or psychological overreaching of any kind. See Part III - B of Colorado v. Connelly, supra, and Colorado v. Spring, __ U.S. ___, 107 S.Ct. 851 (1987). This is a far greater dissipation of connection than

occurred in Michigan v. Mosley, where the arrestee was reinterrogated within a few hours, and was falsely told that another defendant had implicated him, but the statements were held admissible. That Mosley involved invocation of the right to silence, while this case involved invocation of the right to counsel, is a distinction which makes absolutely no logical difference when the question of whether the arrestee's exercise of his right was scrupulously honored and effective; if the Mosley statements were properly admitted (and this Court held that they were), then Roberson's statements likewise are properly admissible, and this Court should so hold.

CONCLUSION

Earlier this year this Court admonished itself to decide a case involving alleged police interrogation after invocation of the right to counsel "remember[ing] the purpose behind our decisions in Miranda and Edwards: preventing government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment." Arizona v. Mauro, ___ U.S. ___, 107 S.Ct. 1931, 1936-37 (1987). The approach enunciated in Routhier and applied in this case is plainly at odds with that purpose, because it excludes even properly warned, wholly voluntary confessions, the giving of which had absolutely nothing to do with the environment. The Routhier/Roberson rule goes beyond Edwards, conflicts with numerous decisions from other jurisdictions, ignores the convergence of Fifth and Sixth Amendment analysis found in the recent decisions of this Court, offends the rationale behind the exclusionary rule, violates the independent

source doctrine, and cannot be squared with common sense. This Court should grant certiorari to eradicate this thoroughly bad approach to interrogation issues.

Respectfully submitted,

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THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

STATE OF ARIZONA,	)	
	)	
Plaintiff,	)	No. CR-16041
	)	
vs.	)	
	)	
RONALD ROBERSON,	)	
	)	
Defendant.	)	
	)	

APRIL 3, 1986

BEFORE THE HONORABLE

MICHAEL D. ALFRED

MOTION TO SUPPRESS

APPEARANCES:

PAUL LAURITZEN

For the Plaintiff

MICHAEL DRAKE

For the Defendant

JANET THOMAS
Official Court Reporter

APPENDIX 1

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JERRY COTA-ROBLES,

called as a witness on behalf of the State, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LAURITZEN:

Q On what date is all of this happening? The burglary is the 15th, when did you become aware of it, on the 15th or --

A I became aware of the burglary on the 15th and went out to Tucson Estates the 16th of April.

Q All right. After you left Tucson Estates, you came back to the Tucson Police Department?

A Yes, I did.

Q At some point did you engage in conversation about that car with any

other detectives?

A Yes.

Q What date was that?

A That was on the 18th of April.

[PAGE 8]

Q All right. Where were you when you had that conversation?

A I was on the third floor of the main police station.

Q Who was present for it?

A I was -- contact was made over the telephone.

Q You called --

A Yes, I did.

Q -- these --

A I called the major offenders' unit, which is on the first floor.

Q What was your purpose for calling them?

A I wanted them to help me, I had a suspect vehicle, and to let them know, be aware I'm watching out for

it in case they had any burglaries, to report it to the major offenders' unit. It's a burglary unit, people that go out and do undercover work for us.

Q Who do you remember works out at major offenders; do you remember?

A Barbara Wright.

Q When you gave her that suspect vehicle information, what -- did she respond in any way indicating that she recognized that or not?

A Yes.

[PAGE 9]

Q What did she tell you?

A She told me that a subject had been arrested in that vehicle for doing a burglary on the east side.

Q And did she give you his name?

A Yes, she did.

Q What other information, if any, did she give you about him?

A She gave me his name and told me who was handling the case on the east side.

Q And who was that?

A Detective Quinn and Detective Thorson.

Q Did you contact either of them?

A Yes, I did.

Q When?

A That same day right after I got off the phone with Barbara Wright.

Q And was that on the phone or in person?

A On the phone.

Q And what was the nature of your contact with them?

A I advised them that I had had a burglary involving that vehicle, and they advised me that he had been arrested doing a burglary on the east side, Mr. Roberson.

[PAGE 10]

Q What happened then?

to the charge on which the person invoked his rights, purports to be nothing more than an application of Edwards v. Arizona, 451 U.S. 477 (1981). However, Routhier plainly goes far beyond Edwards. Edwards involved a reinterrogation about the same crime as to which the defendant had invoked counsel; to extend it to preclude questioning about wholly unrelated offenses is to take it beyond both its logic and its facts. In the past this Court has cautioned against expanding "currently applicable exclusionary rules by erecting additional barriers to placing truthful and probative evidence before state juries...." Lego v. Twomey, 404 U.S. 477, 488-89 (1972). That, however, is precisely what the Routhier/Roberson rule does -- expand the Edwards exclusionary rule into an area not clearly contemplated by that decision.

Judge Learned Hand warned that, "The suppression of truth is a grievous necessity at best, more especially when as here its inquiry concerns the public interest; it can

be justified at all only when the opposed private interest is supreme." McMann v. Securities and Exchange Commission, 87 F.2d 377, 378 (2d Cir. 1937), cert. denied, 301 U.S. 684. That there is such a "supreme" interest in precluding voluntary confessions because of an invocation of rights in a wholly separate investigation is far from self-evident. Indeed, the appellate courts in a number of jurisdictions have concluded (many of them post-Routhier) that Edwards does not bar questioning about unrelated offenses. See Lofton v. State, 471 So.2d 665 (Fl.App. 1985), rev. denied, 480 So.2d 1294; State v. Harriman, 434 So.2d 551 (La.App. 1983); supervisory writ denied, 440 So.2d 551 (La. 1983), cert. denied, 106 S.Ct. 1958 (1986); State v. Dampier, 333 S.E.2d 230 (N.C. 1985)(notes but declines to follow Routhier); State v. Newton, 682 P.2d 295 (Utah 1984); McFadden v. Commonwealth, 300 S.E.2d 924 (Va. 1983); State v. Cornethan, 684 P.2d 1355 (Wash.App. 1984); cf. State v. Taylor, 643 P.2d 379, 382

(Or.App. 1981) (assumes without deciding that custodial conversations after invocation of the right to counsel may be permissible if concerned with matters unrelated to the one on which the right was invoked); People v. Warner, 146 Ill.App.3d 370, 496 N.E.2d 1010 (1986) (knowledge of invocation of right to counsel to F.B.I. during questioning will not be imputed to Chicago police who subsequently questioned defendant about same crime, so statements admissible despite Edwards). The Routhier/Roberson approach not only extends the reach of Edwards beyond its original intendment, but in doing so conflicts with holdings from a substantial number of other jurisdictions. Such a conflict is one of the factors listed in Supreme Court Rule 17.1 as indicating that this Court should seriously consider granting certiorari.

B. This Court's on-going merger of Fifth and Sixth Amendment principles shows that Edwards should not be applied to bar police-initiated interrogation on a case concerning which the arrestee has not invoked counsel.

Assuming that the decisions in Edwards and its progenitor, Miranda v. Arizona, 384 U.S. 436 (1966), are indeed the foundation on which Routhier/Roberson rests, the question immediately arises whether or not that foundation has so shifted that the superstructure must collapse. Earlier Supreme Court cases, including Miranda and Edwards, attempted to maintain some distinction between a Fifth Amendment right to counsel at interrogation (which those cases protect), and a Sixth Amendment right to advice of counsel triggered by institution of the accusatory process, as in Massiah v. United States, 377 U.S. 201 (1964). However, even the Edwards court found support for its holding in Sixth Amendment decisions. (See 451 U.S. at 484, n. 8.) Whatever viability the Fifth Amendment/Sixth Amendment distinction may have previously possessed appears to have been wiped out in Michigan v. Jackson, ___ U.S. ____, 106 S.Ct. 1404 (1986). If a complete wall of separation between Fifth

and Sixth Amendment analysis really existed, Jackson could not have been decided as it was. The facts in Jackson revolved around a plain Sixth Amendment right to counsel after arraignment, but the argument for exclusion was based on Miranda and Edwards, which purport to rest on the Fifth Amendment. Nonetheless, and in the face of a vigorous dissent, this Court treated a request for counsel at arraignment as being identical in effect to a request for counsel during questioning under Edwards. This clearly indicates that Sixth Amendment cases have significance in applying Edwards.

This meshing of the two approaches is important to the present case, because of two other new Sixth Amendment decisions. In Maine v. Moulton, ___ U.S. ____, 106 S.Ct. 477 (1985), the question was admissibility of statements made to an informer. This Court held that statements about charges on which the defendant already had been indicted had to be excluded, because obtaining them violated the right to

counsel, but statements on new charges, where the right to counsel had not attached, were admissible:

> [To] exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities. Consequently, incriminating statements pertaining to pending charges are inadmissible at the trial of those charges, not withstanding the fact that the police were also investigating other crimes, if, in obtaining this evidence, the State violated the Sixth Amendment by knowingly circumventing the accused's right to the assistance of counsel.[16]

---

16 Incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses.

(106 S.Ct. at 489-90; emphasis added.)

Thus, statements concerning different offenses were specifically held subject to differing treatment, even when developed simultaneously by one person in the course of a single investigation. A fortiori,

statements about different offenses, developed at different times, by different investigators, in the course of two wholly independent investigations, should not be treated the same. Inasmuch as there was no nexus whatever between the statements given in this case and the statements given in the case on which Roberson was originally arrested and interrogated, the statements offered in this case should be examined by themselves. Since there was no involuntariness or failure to comply with Miranda and Edwards in this investigation, the statements given should be entirely admissible. This is especially true because there was no knowing circumvention of Roberson's right to counsel; on the contrary the police followed Miranda to the letter and had no idea that the right to counsel had been invoked.

This conclusion is reinforced by Moran v. Burbine, ___ U.S. ____, 106 S.Ct. 1135 (1986), which held that a confession is admissible, even if the defendant's lawyer

[PAGE 27]

After that he was interrogated by Officer Garrison, and after that apparently by Officer Quinn, yet on April 16th. And then on April 19th he was interrogated by Officer Cota-Robles and made the incriminating statement that we are requesting be suppressed.

[PAGE 43]

AFTER THE RECESS:

THE COURT: Back for the record on CR-16041, State versus Roberson.

For the record show the presence of both counsel and the defendant.

As to the defendant's motion to suppress, the Court has read and considered the memorandum, both memorandum of counsel. And the testimony has been [PAGE 44] taken. I also listened to the tape, and did some

research on my own, and I'm going to make a little bit of a speech here so that in the event there is an appeal, there'll be no problems and everybody knows what to appeal from.

The Court's found that the Arizona case law has held that once an accused has invoked his right to counsel, he may not be interrogated concerning that incident or matters inextricably related to that incident pursuant to the holding in State versus Hensley, Arizona 137-80.

The holding in Hensley was, that continuing to question the defendant on subjects related to the subject for which the accused requested the counsel is inconsistent with the holding in Miranda versus Arizona.

State versus Routhier,

R-o-u-t-h--i-e-r, Arizona 137-90, takes State versus Hensley one step further. And in that, in Routhier the question is whether the defendant's Fifth and Fourteenth Amendment rights were violated when the defendant was interrogated concerning unrelated matters after asserting his right to counsel on another matter.

Routhier was based on Edwards versus Arizona which held that once the defendant has invoked his right to counsel, he may not be re-interrogated [PAGE 45] unless counsel has been made available to him or he initiates the conversation.

The Routhier court states that whether the defendant is re-interrogated about the same offense or an unrelated offense makes no difference for Fifth Amendment

purposes.

The Routhier court further stated that Edwards is clear and unequivocal, there is to be no further interrogation by authorities once the right to counsel is invoked. The Court in that case finding that the assertion of the right to counsel is an assertion by the accused that he is not competent to deal with authorities without legal advice. And that the resumption of questioning by the police without the requested attorney being provided, strongly suggests to the accused that he has no choice but to answer.

State versus Clabourne at 142 Arizona 335 is not found to be of much assistance here, since the defendant in that case never invoked his right to counsel to the police officers.

On appeal he claimed that since he was represented by counsel on another matter, the waiver of that right on the instant matter was invalid.

In this case the Court finds that the only permissible interrogation of the defendant after he had [PAGE 46] invoked his right to counsel - in this case I mean in State versus Roberson, CR-16041 - Court finds that the only permissible interrogation of the defendant Roberson after he had invoked his right to counsel would be where he had initiated the conversation, which is not the case here.

The Court thus grants the defendant's motion to suppress the statements obtained by Detective Cota-Robles.

However -- I'm not done yet. However,

the Court has heard sufficient evidence to conclude that the trustworthiness of the evidence, that is the statement, satisfies legal standards and will, pursuant to State versus Swinburne at 116 Arizona 402, allow the statement to be used for impeachment purposes with a limiting instruction to the jury concerning the use by them of such a statement.

[PAGE 50]

MR. LAURITZEN: The other thing that I guess I would like to make clear is a finding of fact. That there is virtually no nexus, or I guess I might ask for the Court to make a finding of the fact that what, if any, nexus there was between Detective Cota-Robles' interview of the defendant, which the Court is suppressing, and the earlier invocation of rights, or any fruit therefrom, or violation of right, if you

will, or fruit therefrom.

It's the State's position that what actually happened in this case, or via inevitable discovery, that detective Cota-Robles eventually was or would have been led to Mr. Roberson, had there been an April 16th case or not.

And I think that is of some significance here.

THE COURT: Well, nobody is questioning Detective Cota-Robles' motives or his methods. You know, what he has done, there's nothing wrong with what he has done except for the fact that the man had invoked his right to counsel earlier.

MR. DRAKE: All right, is the Court specifically finding that the April 19th interrogation [PAGE 51] by Detective Cota-Robles was in no way a fruit of the April 16th violation, other than it

followed it in time?

THE COURT: Yes.

MR. LAURTIZEN: So it was not a fruit?

THE COURT: No, I find that it was not.

[PAGE 52]

MR. DRAKE: Your Honor, I have spoken with Mr. Roberson in the hallway about this matter, and we would stipulate to this but only this: That if these other officers, mentioned by Mr. Lauritzen, were called to testify, that they would testify that they were not aware that he had expressly requested presence of counsel on April 16th, 1985.

FILED BY CLERK
MAR. 19, 1987
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION TWO

THE STATE OF ARIZONA, Appellant, vs. RONALD WILLIAM ROBERSON, Appellee.	)	NO. 2 CA-CR 4474-5 Department A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-16041

Honorable Michael D. Alfred,
Judge Pro Tempore

AFFIRMED

Robert K. Corbin, The Attorney General
by Bruce M. Ferg — Tucson

Attorneys for Appellant

Robert L. Barrasso — Tucson

Attorney for Appellee

HATHAWAY, Chief Judge.

A detective (Cota-Robles) investigating an April 15, 1986, burglary discovered that the suspect, appellee, was already in custody, charged with an April 16, 1986 burglary. In response to the April 16 arrest, appellee had invoked his Fifth Amendment right to counsel. On April 19, 1986, when Cota-Robles advised appellee of his Miranda rights, appellee had neither been provided counsel nor released from custody since his April 16 arrest. Appellee did not reassert his request for counsel; instead, he inculpated himself as to the April 15 burglary. At trial, the court relied on State v. Routhier, 137 Ariz. 90, 669 P.2d 68 (1983), and granted appellee's motion to suppress the April 19th statements.[1/] The state now appeals, requesting that we either rule Routhier is no

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1/ The Routhier court held that "after requesting counsel during the initial interrogation, the [accused] should not have been subjected three days later to interrogation which he did not initiate, without counsel having been made available to him." 137 Ariz. at 98, 669 P.2d at 76.

longer viable authority or ask that the Arizona Supreme Court overrule or limit their decision.

The Court of Appeals is not empowered to overrule a decision of the Arizona Supreme Court. State v. Korte, 115 Ariz. 517, 566 P.2d 318 (App. 1977). We do agree with appellant that we are not bound to follow Arizona Supreme Court decisions if "recent interpretations of the United States Constitution by the United States Supreme Court have rendered the position of the Arizona Supreme Court untenable." State v. Casey, 10 Ariz.App. 516, 517, 460 P.2d 52, 53 (1969). However, no recent United States Supreme Court decision has addressed the Fifth Amendment issue presented by Routhier. The two decisions appellant cites us to are easily distinguishable. Maine v. Moulton, ___ U.S. ____, 106 S.Ct. 477, 88 L.Ed. 481 (1986); Moran v. Burbine, ___ U.S. ____, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986).

As for appellant's request that we catalogue Routhier's flaws for the Arizona Supreme Court's convenience, we respond that appellant construes the decision too broadly. Contrary to appellant's characterization, Routhier does not hold that "once an accused invokes his right to counsel, he can never again be questioned until he is provided with a lawyer." In Routhier, as in the instant case, the accused was continuously in police custody from the time of asserting his Fifth Amendment right through the time of the impermissible questioning. The coercive environment never dissipated.

We affirm.

/s/ James D. Hathaway
JAMES D. HATHAWAY, Chief Judge

CONCURRING:

/s/ Lawrence Howard
LAWRENCE HOWARD, Presiding Judge

/s/ Lloyd Fernandez
LLOYD FERNANDEZ, Judge

SUPREME COURT

STATE OF ARIZONA

201 West Wing State Capitol
1700 West Washington
Phoenix, Arizona 85007-2866

Telephone (602) 255-4536

July 1, 1987

RE: STATE OF ARIZONA vs. RONALD WILLIAM ROBERSON
Supreme Court No. CR-87-0110-PR
Court of Appeals No. 2 CA-CR 4474-5
Pima County No. CR-16041

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on June 30, 1987, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Record returned to the Court of Appeals, Division Two, Tucson, this 1st day of July, 1987.

DAVID R. COLE, Clerk

TO: Hon. Robert K. Corbin, Attorney General,
1275 West Washington, Phoenix, Az. 85007

Bruce M. Ferg, Assistant Attorney General,
315 State Government Building,
402 West Congress, Tucson, Az. 85701-1367

Robert L. Barrasso, Esq.,
3100 North Campbell Avenue, Suite 101,
Tucson, Az. 85719

Joyce Goldsmith, Clerk, Court of Appeals,
Division Two, 416 West Congress,
Tucson, Az. 85701

No. 87-354

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

THE STATE OF ARIZONA,

Petitioner,

vs.

RONALD WILLIAM ROBERSON,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS
IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARIZONA

ROBERT L. BARRASSO, ESQ.
3100 N. Campbell Ave., #101
Tucson, AZ 85719
(602) 795-2002

The Respondent, RONALD WILLIAM ROBERSON, asks leave to file the attached Brief in Opposition, without payment of costs and to proceed in forma pauperis. Petitioner has been granted leave to so proceed in both the Superior Court of Arizona and Arizona Court of Appeals. Respondent's Affidavit in support of this motion is attached hereto.

RESPECTFULLY SUBMITTED this 28th day of October, 1987.

ROBERT L. BARRASSO
3100 N. Campbell Ave., #101
Tucson, AZ 85719
(602) 795-2002

A F F I D A V I T

STATE OF ARIZONA)
) ss.
County of Pima)

I, RONALD WILLIAM ROBERSON, being first duly sworn, deposes and says that I am the respondent in the above-entitled case; that in support of my Motion to Proceed in Forma Pauperis, I state that because of my poverty I am unable to pay the costs of said case or to give security therefore; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of proceeding in this court are true:

That I am not presently employed and that I have

ROBERT L. BARRASSO
ATTORNEY AT LAW
3100 North Campbell Avenue
Suite 101
Tucson, Arizona 85719
Telephone (602) 795-2002

been incarcerated in Perryville, Arizona State Prison Correctional Facility since March 24, 1986 and will be incarcerated until 2001; that prior to the above date I was unemployed, and my income per month was approximately -0-; that within the last 12 months I have not received any income from any business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources; that I do not won any cash or checking or savings accounts; that I do not own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing); that there are no persons whom are dependent upon me; that I understand that a false statement or answer to any questions in this Affidavit will subject me to penalties for perjury.

RB for Ro Roberson

SUBSCRIBED AND SWORN to before me this 28th day of October, 1987.

Christine L. Cook
Notary Public

My Commission Expires:
April 30, 1990

ROBERT L. BARRASSO
3100 North Campbell Avenue
Suite 101
Tucson, Arizona 85719
Telephone (602)795-2002

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of October, 1987, I served the foregoing Motion to Proceed in Forma Pauperis upon opposing counsel by causing to be mailed three copies, postage prepaid to:

BRUCE M. FERG
ASST. ATTORNEY GENERAL
315 State Government Bldg.
402 W. Congress
Tucson, AZ 85701-1367

ROBERT L. BARRASSO

SUBSCRIBED AND SWORN to before me this 28th day of October, 1987 by ROBERT L. BARRASSO.

Christine L Cook
Notary Public

My Commission Expires:
April 30, 1990

ROBERT L. BARRASSO
3100 North Campbell Avenue
Suite 101
Tucson, Arizona 85719
Telephone (602)795-2002

Let the Applicant proceed without prepayment of costs or fees or the necessity of giving security therefore.

ORDERED this _____ day of _____, 1987.

JUDGE OF THE SUPREME COURT
OF THE UNITED STATES

No. 87-354

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

THE STATE OF ARIZONA,

Petitioner,

vs.

RONALD WILLIAM ROBERSON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARIZONA

ROBERT L. BARRASSO, ESQ.
3100 N. Campbell Ave., #101
Tucson, AZ 85719
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QUESTION PRESENTED FOR REVIEW

Did the trial court and the Court of Appeals properly hold that since the Defendant had invoked his Fifth Amendment right to counsel during his initial interrogation and counsel was never provided, that statements made by Defendant pursuant to subsequent interrogation must be suppressed.

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Respondent does not take issue with Petitioner's statement of opinions below, its jurisdictional statement and its citation of the constitutional and statutory provisions involved.

STATEMENT OF THE CASE

Respondent does not dispute the statement of the case set forth by Petitioner. However, a few points crucial to the decision of the Arizona Court of Appeals should be set forth more clearly.

On April 16, 1986, Respondent was arrested near the scene of a burglary which had occurred only moments earlier. At that time, he was advised of his rights by Officer Perez, and, "subject replied that he understood his rights, and that he wanted a lawyer before answering any questions." (ROA, pp. 110-112). This same record makes clear that at no time was Respondent supplied an attorney prior to the statements at issue.

Shortly after making the request to speak to an attorney, different officers questioned him while he was in custody at the jail on the April 16 burglary charges. (ROA at 106-107; R.T., April 3, 1986, pp. 23-41). Then on April 19, three days after Respondent had requested a lawyer "before answering any questions" and also after being interrogated once by officers after said request, and while still in custody, Detectives Cota-Robles, Quinn and Thorison

went out to the jail and questioned Respondent again. While it is true that at that point he was read his Miranda rights and stated that he understood them and wanted to talk, he had not been allowed to see a lawyer since his request on April 16 and he had been kept in custody since that time.

It is those statements made on April 19 which were suppressed and which are the subject of this appeal.

SUMMARY OF ARGUMENT

The Petition should not be granted because the issue is already well-settled in Arizona and Federal law, in spite of the contentions of Petitioner. The Court of Appeals decided the case correctly and no further review is necessary.

ARGUMENT

A. Fifth and Sixth Amendments are Clearly Distinct and this is a Fifth Amendment Case.

The State's Petition, by a very confused reading of several United States Supreme Court cases, argues that the Fifth and Sixth Amendment cases are so blurred that Sixth Amendment analysis should always apply to Fifth Amendment cases. A careful reading of those same cases indicate quite the contrary. The Fifth Amendment and Sixth Amendment encompass two very distinct rights. It is true that Fifth Amendment analysis has been, and continues to be, applied to

Sixth Amendment cases, but no case suggests that Fifth Amendment rights should be restricted because of Sixth Amendment analysis.

In Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966), the Supreme Court recognized that custodial interrogations generate "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." Id. at 467, 86 S.Ct. at 1624. To combat the compelling pressures which are involved in the very nature of custodial interrogations, and to permit a full opportunity to exercise the privilege against self-incrimination, the Court held that prior to initiating any questioning, the State must adequately and effectively apprise the suspect of his rights, "and the exercise of those rights must be fully honored." Id. Thus, prior to initiating any questioning, the State must advise the suspect of its intention to use the statements against the suspect and must also inform the suspect of his right to remain silent and to have counsel present if he so desires. Id. at 468-470, 86 S.Ct. at 1624-1626. Miranda goes on to say that when a defendant requests to remain silent, or if he states that he wants an attorney, the interrogation must cease until an attorney is present. Id. at 473-474, 86 S.Ct. at 1627.

In Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880 (1981), the Supreme Court held that when an accused person in

custody expresses his desire to answer no questions except through counsel, that the suspect is not subject to further interrogation by the authorities until counsel has been available to him, unless the accused starts another conversation. Id. at 484-485, 101 S.Ct. at 1884-1885. In Solem v. Stumes, 465 U.S. 638, 104 S.Ct. 1338 (1984), the Supreme Court stated that the holdings in Miranda and Edwards established a "bright line rule to safeguard pre-existing rights." 465 U.S. at 646. The Court stated the bright line rule as "once the suspect had invoked his right to counsel[,] the suspect had to initiate subsequent communication." Id.

It is clear then that the Fifth Amendment, in certain circumstances, provides its own separate right to counsel apart from the Sixth Amendment. That is to say, once a person is in a situation involving custodial interrogation, and that person has requested counsel, his right to silence entails the right not to speak again unless counsel is present. Indeed, a recent Supreme Court case, Michigan v. Jackson, 106 S.Ct. 1404 (1986), states as follows:

> The question is not whether respondents had a right to counsel at their post-arraignment, custodial interrogations. The existence of that right is clear. It has two sources. The Fifth Amendment protection against compelled self-incrimination provides the right to counsel at custodial interrogations. [Citing Edwards and Miranda]. The Sixth Amendment guarantee of the assistance of counsel also provides the right to counsel at post-arraignment interrogations. (Emphasis added).

Id. at 1407.

In dealing with the Fifth Amendment right to

silence, the focus is on the mental state of the defendant. This focus is to assure that any statements made by him are voluntary. To that end, "the state of mind of the police is irrelevant to the question of the intelligence and voluntariness of respondent's election to abandon his rights." Moran v. Burbine, 106 S.Ct. 1135, 1142 (1986). The Moran case makes a clear distinction between a defendant in custodial interrogation who has simply requested to remain silent and one who has requested not to speak further until consulting with an attorney. In Moran, there was no request for counsel but simply a request to remain silent and a reinterrogation. In distinguishing the two situations, the court stated:

> When a suspect has requested counsel, the interrogation must cease, regardless of any question of waiver, unless the suspect himself initiates the conversation. (Emphasis in original).

106 S.Ct. at 1142, n.1.

In Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321 (1975), Justice White in a concurring opinion stated the distinction between a simple request to remain silent and a request to remain silent until one can speak with an attorney:

> [T]he reasons to keep the lines of communication between the authorities and the accused open when the accused has chosen to make his own decisions are not present when he indicates instead that he wishes legal advice with respect thereto. The authorities may then communicate with him through an attorney. More to the point, the accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may

> properly be viewed with skepticism.

Id. at 110, n.2, 96 S.Ct. at 329, n.2.

State v. Routhier, 137 Ariz. 90, 669 P.2d 68 (1983), right on point and keeping with current United States Supreme Court case law, states:

> The assertion of the right to counsel is an expression by the accused that he is not competent to deal with the authorities without legal advice. See Edwards v. Arizona, supra. The resumption of questioning in the absence of an attorney after an accused has invoked this right to have counsel present during police interrogation strongly suggests to an accused that he has no choice but to answer. Thus, "a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism." (Quoting Michigan v. Mosley, supra).

Id. at 97-98, 669 P.2d at 76-77.

In Michigan v. Mosley, supra, the Supreme Court allowed a custodial reinterrogation after defendant asserted his right to remain silent. That case allowed reinterrogation where there was a finding that the right of the defendant to cut off questioning was scrupulously honored. In a footnote, the court stated:

> The dissenting opinion asserts that Miranda established a requirement that once a person has indicated a desire to remain silent, questioning may be resumed only when counsel is present...But clearly, the court in Miranda imposed no such requirement, for it distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney and directed that "the interrogation must cease until an attorney is present" only "[i]f the individual states that he wants an attorney." 384 U.S. at 474.

Id. at 104, n. 10, 96 S.Ct. at 326, n. 10.

Thus, Michigan v. Mosley clearly does allow reinterrogation in a custodial situation where a defendant chooses to remain silent. It also makes clear that where a defendant requests counsel, reinterrogation is not allowed.

In summary, the Fifth Amendment has, as its focus, protection against the inherent pressures of custodial interrogation. To that end, once a person is in a situation where he is not free to leave, the State must advise him of his right to remain silent and his right to have an attorney present if he decides to speak. If the defendant requests simply to remain silent, the reinterrogation is allowed if the facts show that the defendant's right to cut off questioning is scrupulously honored. On the other hand, if the defendant requests an attorney, no further custodial interrogation is allowed. This is not because of the rightness or wrongness of any State action, but rather because once a defendant has requested his right to counsel and is questioned further, the defendant has strong reason to believe that he has no choice but to answer. The State's behavior is irrelevant under Fifth Amendment analysis. The only focus is the voluntary nature of the statements.

Quite distinct from this is Sixth Amendment analysis which does not give a defendant a right to counsel until the initiation of formal charges. Michigan v. Jackson, 106 S.Ct. at 1408. In Main v. Moulton, 106 S.Ct. 477, 483-84 (1985), the Supreme Court explained that the Sixth Amendment

embodies " 'a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself. ...The right to counsel safeguards the other rights deemed essential for the fair prosecution of a criminal proceeding." (Quoting Johnson v. Zerbst, 304 U.S. 458, 462-63, 58 S.Ct. 1019, 1022 (1938)).

The right to counsel attaches at or after the time the judicial proceedings have been initiated against a defendant because, after the initiation of adversary criminal proceedings, "the government has committed itself to prosecute, and...the adverse positions of government and defendant have solidified. It is then that the defendant finds himself faced with the prosecutorial forces of organized society and immersed in the intricacies of substantive and procedural criminal law." United States v. Gouveia, 467 U.S. 180, 189, 104 S.Ct. 2292, 2298 (1984).

Accordingly, the language Petitioner cites from Main v. Moulton, supra can be understood in its proper context. To exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public interest in the investigation of criminal activities.

B. The Present Case Involves the Fifth Amendment Only

and the Bright Line Rule of Miranda and Edwards Clearly Applies.

Petitioner makes a gross error by stating that the Routhier case bans any further police interrogation of any in-custody suspect who has invoked his "right to counsel." A proper statement is that Routhier bans any police initiated interrogation of an arrestee who has, as part of the invocation of his right to silence, indicated that he dies not wish to speak unless represented by counsel. This clearly is a proper application of the bright line rule of Miranda and Edwards. In Fifth Amendment analysis, the good faith or claimed ignorance of previous rights assertions by the police officers is irrelevant since the focus is the defendant's own sense of compulsion.

In the presence case, with Defendant having requested an attorney before answering questions, having been questioned two times after that and having been incarcerated for several days without the presence of an attorney, there is clear evidence that the statements were involuntary. As far as the defendant was concerned, his perception of whether he should talk or not was not affected by whether he was talking about crime 1 or crime 2. Rather, his sense of compulsion comes from the custodial setting, the fact that he has requested an attorney and was not supplied one, and the fact that he was questioned again by police. All of these factors show, as set forth in Routhier, that the State's

actions strongly suggested to the accused that he had no choice but to answer. Under these circumstances, there can be no finding that the statements were voluntary and that there had been valid waivers.

Moran v. Burbine, 106 S.Ct. 1135 (1986), handed down in March 1986 reiterates the validity of the bright line rule found in Miranda and Edwards. The case states in a footnote:

> Yet, as both Miranda and subsequent decisions construing Miranda make clear beyond refute, "the interrogation must cease until an attorney is present" only "[i]f the individual states that he wants an attorney." (Citing Michigan v. Mosley).

Id. at 1147, n.4.

The error of the State's argument is most obvious in this statement found on pages 11-12 of the Petition for Writ of Certiorari:

> A fortiori, statements about different offenses, developed at different times, by different investigators, in the course of two wholly independent investigations, should not be treated the same. Inasmuch as there was no nexus whatever between the statements given in this case and the statements given in the case on which Roberson was originally arrested and interrogated, the statements offered in this case should be examined by themselves.

The error is two-fold. First, the focus of the above statement is on police conduct rather than Defendant's conduct. Second, there clearly was a nexus when one focuses on Defendant's conduct: He requested to remain silent and to speak with an attorney. This request was denied and while still incarcerated, two other interrogations took place. The

State simply ignores the clear language found in the Fifth Amendment analysis:

> [W]hether intentional or inadvertent, the state of mind of the police is irrelevant of the question of the intelligence and voluntariness of the respondent's election to abandon his rights.

Moran v. Burbine, 106 S.Ct. at 1142.

Since the focus of the Fifth Amendment is on the Defendant, and since the Defendant in this case was clearly denied a right to counsel after requesting said counsel, yet was interrogated twice while in continual custody without speaking to an attorney, it is clear that the statements were properly suppressed under Fifth Amendment analysis.

C. Independent Source Law is Irrelevant.

The Petitioner goes to great lengths to argue that the independent source doctrine is seriously offended by the "meat-ax Routhier/Robinson approach." Again, Petitioner simply fails to appreciate the focus of Fifth Amendment analysis. As set forth above, the focus is not on the State but on the suspect and the potential for compulsion inherent in any statements which are made while in custody. No matter how innocent the conduct of the State is, and no matter how independent any subsequent interrogation is, it has the same affect on Defendant: If he has requested an attorney and is then asked by police to answer questions, there is an atmosphere created that he has no choice but to answer the questions. This is why subsequent interrogation is wrong.

The Petitioner also argues that it is placed in a worse position than it would have been had it not violated Defendant's rights. This is obviously not true. Had Defendant been supplied with an attorney before any further interrogation, he and his attorney would have decided to proceed with his defense and in all likelihood he would have not made subsequent admissions. It is only when you ignore the effect of subsequent custodial interrogation on the Defendant that one can claim anything close to an independent source. The source of Roberson's statements was not independent but rather caused by continual police custodial interrogation without an attorney.

D. The Routhier Rule is Reasonable.

Routhier does not hold, as the State alleges, that once an accused invokes his right to counsel he can never again be questioned until he is provided with a lawyer, regardless of subject matter. Rather, the rule as set forth in Routhier and its foundational cases, Miranda and Edwards, is that once an accused states that he wishes to remain silent until proved with a lawyer, he cannot be questioned on any subject so long as he remains in custody without speaking to a lawyer.

To hold otherwise would not lead to absurd results. The alleged absurd result set forth in the State's Petition on page 23 again plainly misreads Routhier. If a defendant

is arrested and interrogated about crime A and that questioning is ended when he invokes his right to counsel and he is released, he is no longer in custody. Once he is out of custody, the right to silence is no longer applicable.

CONCLUSION

This case is a simple one to decide when the confused analysis of the State is set aside. Miranda and Edwards clearly hold that a defendant's right to silence under the Fifth Amendment also entails the right to have an attorney present before speaking while in custodial interrogation. The focus of the Fifth Amendment is on the voluntariness of defendant's statements. The bright line rule of Miranda and Edwards requires a finding that where a defendant remains in custody after requesting counsel, any subsequent interrogation would be unduly coercive and, therefore, statements made in subsequent interrogations must be suppressed. The subject matter of those interrogations is irrelevant under Fifth Amendment analysis since it is the voluntariness of the statements that is the issue. In the present case, Defendant clearly decided to speak to counsel before making statements to the officers and indicated as much to the police. He was then confined for several days and re-interrogated without speaking to a lawyer. The statements made during the subsequent interrogation were properly suppressed.

The Court of Appeals and the trial court were correct in suppressing the statements. This Court should deny the Petition for Writ of Certiorari.

RESPECTFULLY SUBMITTED this 28th day of October, 1987.

ROBERT L. BARRASSO
3100 N. Campbell Ave., #101
Tucson, AZ 85719

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of October, 1987, I served the foregoing Brief in Opposition upon opposing counsel by causing to be mailed three copies, postage prepaid to:

BRUCE M. FERG
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315 State Government Bldg.
402 W. Congress
Tucson, AZ 85701-1367

ROBERT L. BARRASSO

SUBSCRIBED AND SWORN to before me this 28 day of October, 1987 by ROBERT L. BARRASSO.

Christine L Cook
Notary Public

My Commission Expires:
April 30, 1990

App

7

ARIZONA SUPERIOR COURT, PIMA COUNTY

Judge: Pro-Tempore: MICHAEL D. ALFRED
Court Reporter: Janet Thomas

CASE NO. CR-16041/CR-15389
DATE April 3, 1986

STATE OF ARIZONA,	( )	Paul Lauritzen
vs	( )	
RONALD WILLIAM ROBERSON,	( )	Michael Drake
	( )	
	( )	

EVENT SUMMARY

Type: Deft. Mot. Sup. Stmt		Result: Granted		
Date:	Time:	Length:	Div:	Req:
Type: CR-16041		Result: Dismiss w/o Prejudice		
Date:	Time:	Length:	Div:	Req:
Type: CR-15389 (all 4 trials)		Result: Dismiss w/o Prejudice		
Date:	Time:	Length:	Div:	Req:
Type:		Result:		
Date:	Time:	Length:	Div:	Req:

MINUTE ENTRY

PENDING MOTIONS:

Defendant present, in custody.

Janet Thomas reporting.

This is the time set for hearing on the Defendant's Motion to Suppress Statements.

Detective Jerry Cota-Robles is sworn, examined, questioned by the Court, and cross-examined.

State's Exhibit 1, being Sony HF60 cassette tape, is identified.

State's Exhibit 1A, being transcript of taped statement, is identified.

State's Exhibit 2, being copy of letter dated April 30, 1985, is identified.

Linda Brown
Deputy Clerk

State's Exhibits 1 and 1A, previously identified, are admitted for purposes of this hearing, there being no objection.

Counsel argue the Defendant's Motion to Suppress Statements to the Court.

Mr. Drake offers to stipulate after Mr. Roberson was arrested on April 16, 1985, he was advised of his rights by Officer Perez; and, according to his report, "subject replied that he understood his rights, and that he wants a lawyer before answering any questions." After that he was interrogated by Officer Garrison, and after that by Officer Quinn on April 16, 1985; and on April 19 he was interrogated by Officer Cota-Robles and made incriminating statements, which the defense is asking to be suppressed.

Mr. Lauritzen indicates he will agree with that stipulation but requests an opportunity to call Officers Garrison, Quinn and Wright to supplement the record or by supplementing it with their testimony in the Motion to Suppress which was heard last October in CR-15268.

THE COURT TAKES THE MATTER UNDER ADVISEMENT.

Mr. Lauritzen requests that the Court make a ruling before the jury is sworn.

11:23 a.m. The Court stands at recess until 1:00 p.m. this date.

1:06 p.m. Defendant present, in custody. Respective counsel present. Janet Thomas reporting.

UNDER ADVISEMENT RULING:

Linda Brown
Deputy Clerk

As to the Defendant's Motion to Suppress, the Court has read and considered both memoranda of counsel and the testimony that has been taken. The Court also listened to the tape and did some research on its own.

THE COURT FINDS that the Arizona case law has held that, once an accused has invoked his right to counsel, he may not be interrogated concerning that incident or matters inextricably related to that incident pursuant to the holding in State vs. Hensley, Ariz. 137-80. The holding in Hensley was, that continuing to question the defendant on subjects related to the subject for which the accused requested the counsel, is inconsistent with the holding in Miranda vs. Arizona.

State vs. Routhier, Ariz. 137-90, takes State vs. Hensley one step further. In Routhier, the question was whether the defendant's Fifth and Fourteenth Amendment rights were violated when the defendant was interrogated concerning unrelated matters after asserting his right to counsel on another matter. Routhier was based on Edwards vs. Arizona, which held that once the defendant has invoked his right to counsel, he may not be re-interrogated unless counsel has been made available to him or he initiates the conversation. The Routhier Court stated that whether the defendant is re-interrogated about the same offense or an unrelated offense makes no difference for Fifth Amendment purposes. The Routhier Court further stated that Edwards is clear and unequivocal. There is to be no further interrogation by authorities once the right to counsel is invoked, the Court in that case finding that the

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FILED IN COURT
Apr 3 '86
Deputy

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

THE STATE OF ARIZONA,
Plaintiff,
vs.
RONALD WILLIAM ROBERSON,
Defendant.

NO. CR-16041

SUPPLEMENTARY MEMORANDUM IN SUPPORT OF MOTION TO SUPPRESS STATEMENTS

Defendant has heretofore filed a Motion To Suppress Statement on the grounds the statement was taken in violation of Miranda v. Arizona and was involuntary. Defendant further contends the statement was taken in violation of his right to counsel.

The statement in question was taken by Tucson Police Department Officer Cota-Robles on April 19, 1985 at the Pima County Jail. Defendant admitted to having burglarized a residence on April 15, 1985. He was then charged with the instant offense in an indictment dated August 27, 1985 with burglarizing 4412 East 6th Street in Tucson on April 15, 1985.

On April 16, 1985, Defendant was arrested after being caught burglarizing another residence. Defendant was charged in CR-15268 with this burglary and has been found guilty by a jury. At the time of that arrest, Defendant was advised of his rights . . . .

M-X

by Officer Perez. According to Officer Perez' report, "Suspect replied that he understood his rights, and that he wanted a lawyer before answering any questions."

Notwithstanding Defendant's request for a lawyer, he was then interrogated by Officer Garrison and made incriminating statements about the April 16 burglary. He was further interrogated by Detectives Quinn and Wright.

After Defendant was in custody on the April 16 burglary, Officer Cota-Robles then received information that Defendant may be the person who committed the April 15 burglary. Apparently the description and license number of the vehicle seen during the April 15 burglary matched the vehicle driven by Defendant when arrested on April 16 for the April 16 burglary.

On April 19, 1985, Officer Cota-Robles went to the jail to interview Defendant. He was accompanied by Detective Quinn and Detective Thorson. Defendant confessed to the April 15 burglary, the subject of the instant case.

In CR-15268, involving the April 16 burglary, Defendant filed a motion to suppress the statement given that day on the grounds the statement was taken after he requested an attorney. Hearing on the motion was held October 17, 1985. By minute entry of March 5, 1986, the first day of trial in CR-15268, the Court essentially granted the motion and "Ordered that defendant's statments cannot be used in the State's case- in-chief; however, should the defendant testify, the State may use the statements to impeach the defendant."

Defendant contends the statement taken by Officer Cota-Robles on April 19, 1985 should be suppressed for the same

M-X

No. 87-354

In The
Supreme Court of the United States
October Term, 1987

—o—

THE STATE OF ARIZONA,

Petitioner,

vs.

RONALD WILLIAM ROBERSON,

Respondent.

—o—

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

—o—

PETITIONER'S BRIEF ON THE MERITS

—o—

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QUESTION PRESENTED FOR REVIEW

IS THE RULE OF *EDWARDS v. ARIZONA* THAT POLICE OFFICERS MAY NOT INITIATE INTERROGATION OF AN IN-CUSTODY SUSPECT APPLICABLE TO A CASE WHERE THE SUSPECT, HAVING INVOKED HIS RIGHTS IN REGARD TO A CRIME THEN UNDER INVESTIGATION, LATER CONSENTS TO QUESTIONING ABOUT AN UNRELATED CRIME, CONDUCTED BY OTHER OFFICERS WHO ARE IGNORANT OF THE PRIOR INVOCATION OF RIGHTS AND WHO COMPLY COMPLETELY WITH THE REQUIREMENTS OF *MIRANDA v. ARIZONA*?

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MISCELLANEOUS

OPINIONS BELOW

Afer a suppression hearing the trial court ruled that the police had obtained statements from Roberson in violation of *State v. Routhier*, 137 Ariz. 90, 669 P.2d 68 (1983), so the statements could not be used by the prosecution during its case-in-chief. *Routhier* purports to apply *Edwards v. Arizona*, 451 U.S. 477 (1981). The State appealed this ruling to Division Two of the Arizona Court of Appeals, but the State's claims were rejected in an unpublished Memorandum Decision, *State v. Roberson*, 2 CA-CR 4474-5 (Ariz.Ct.App., Mar. 19, 1987). The State then petitioned for review by the Arizona Supreme Court, but such review was denied by order on June 30, 1987. The Memorandum Decision and the order are reproduced in the Appendix to the Petition for Writ of Certiorari.

———o———

JURISDICTION OF THIS COURT

The action of the Supreme Court of Arizona denying review of the proceedings below occurred on June 30, 1987 and was reflected in a written notice dated July 1, 1987. No rehearing was requested. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 20.1.

———o———

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT V.

No person . . . shall be compelled in any criminal case to be a witness against himself . . . .

AMENDMENT VI.

In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

—————o—————

STATEMENT OF THE CASE

This litigation actually involves two wholly separate criminal cases. The present one, Pima County No. CR-16041, concerned a charge that Roberson burglarized a home on April 15, 1985, and stole certain property belonging to Kenneth Baarson. (State Court Record on Appeal, hereafter referred to as R., at 1.)[1] That same day, April 15, Detective Jerry Cota-Robles of the Burglary Division of the Tucson Police Department received information from a witness to that burglary, describing both a suspect and his vehicle, including a Montana license number. (R.T.

[1]The pages of the Record are serially numbered, so numerical citations are to an actual page rather than an item number.

of April 3, 1986, at 3-7, 15-16.)[2] On April 18, Cota-Robles called the Major Offenders Unit of the Tucson Police Department to alert them about the suspect vehicle. (*Id.* at 7-8). The person with whom he spoke, Det. Barbara Wright, recognized the vehicle description and told Cota-Robles that a subject had recently been arrested in that car for doing another burglary. (*Id.* at 8-9, 17.)

Cota-Robles therefore contacted the case officers on the case in which the arrest had been made, Detectives Quinn and Thorson, and arranged to go with them to question the arrestee, Ronald Roberson, on April 19. (*Id.* at 9-10.) Cota-Robles was unaware whether Roberson had been questioned before, and no one mentioned any assertion of rights having occurred. (*Id.* at 10-11, 18.) At the jail Cota-Robles informed Roberson of his rights and Roberson indicated understanding of them, so the detective turned on the tape recorder, advised Roberson of his rights once again, and proceeded with Det. Quinn to question him about the April 15 burglary. (*Id.* at 10-15, 18-20.) Roberson never said anything about wanting an attorney. (*Id.* at 19.) The resulting taped statement (a transcript of which was admitted as Exhibit 1A at the suppression hearing held on April 3, 1986) amounted to a full confession of the April 15 burglary, but never touches upon the April 16 crime during which Roberson was caught.

The wrinkle develops in this seemingly routine case because of a problem in the other case, CR-15268. It seems that when Roberson was arrested on April 16, he was apprended and warned of his rights at the scene by a uni-

[2]Herein, "R.T." refers to a reporter's transcript.

formed officer named Perez, and stated to Perez that he wanted a lawyer before answering any questions. (R.T. of April 3, 1986, at 26.) Roberson was also questioned at the scene by an officer named Garrison. (*Id.* at 23; R. at 107.) The defense counsel, after consulting with Roberson, stipulated that Garrison was not aware that Roberson had invoked his right to a lawyer. (R.T. of April 3, 1986, at 49, 52.) Detective Quinn also spoke to Roberson at the scene:

> Q. Prior to your speaking to Mr. Roberson at the scene itself, did you either inquire of him or any other person at the scene whether or not he had been advised of his constitutional rights?
>
> A. Actually, it was both, himself and the officer there.
>
> Q. Who did you ask first?
>
> A. Sergeant Harper was the supervisor there. And he was the reason I was there in the first place. He had called out to the Eastside Office and indicated they had a person in custody who had indicated that he was willing to give a statement. That was the reason I was there.
>
> With that knowledge, I then spoke with Mr. Roberson briefly. At that time he was in custody, I believe, in Officer Perez' police car. And I asked if it was true he was willing to give a statement. And he indicated yes, he would.

(R.T. of Oct. 17, 1985, P.M., at 8.)[3]

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[3]This transcript, which was of a suppression hearing in CR-15268, was designated by the prosecutor as part of the record used on the appeal in the present case. (R. at 124.) It therefore is properly before this Court.

Roberson was then transported to the Eastside police substation, where he was further questioned by Quinn and Detective Wright. (*Id.* at 9-11.) The defense, as part of its stipulation, agreed that Quinn and Wright were unaware that Roberson had ever invoked his right to counsel. (R.T. of April 3, 1986, at 49, 52.) The prosecutor also stated that Roberson had been approached by two other officers on April 17 (the day immediately following the arrest), who warned Roberson of his rights and talked to him after he had waived his rights. (*Id.* at 49.)[4] The stipulation by the defense that none of the officers subsequent to Perez knew that Roberson had asked for a lawyer includes these April 17 questioners. (*Id.* at 49, 52.) The record contains no other information about what may have transpired between Roberson and these officers.

Roberson's statements to Garrison, Quinn, and Wright were suppressed in CR-15268, to the extent that they could be used only for impeachment, not in the state's case-in-chief. (R. at 107; R.T. of April 3, 1986, at 27.) The defense in the present case requested that Roberson's statement given on April 19 to Cota-Robles be similarly suppressed, on the basis of *Edwards v. Arizona* and *State v. Routhier*, *supra*. (R. at 106-09.)

The trial court found as a matter of fact that there was no connection whatever between the April 16 violation and the April 19 questioning.

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[4]This statement by the prosecutor was overlooked at the time of the drafting of the Petition in this case, which incorrectly stated that Roberson "was left alone for 3 days before being reapproached . . ." (Petition at 24.) Counsel for Petitioner apologizes to the Court for this inadvertent misstatement.

THE COURT: Well, nobody is questioning Detective Cota-Robles' motives or his methods. You know, what he has done, there's nothing wrong with what he has done except for the fact that the man had invoked his right to counsel earlier.

MR. DRAKE: All right, is the Court specifically finding that the April 19th interrogation by Detective Cota-Robles was in no way a fruit of the April 16th violation, other than it followed it in time?

THE COURT: Yes.

MR. LAURITZEN: So it was not a fruit?

THE COURT: No, I find that it was not.

(R.T. of April 3, 1986, at 50-51.) It also concluded that the statements were sufficiently trustworthy to be admissible for impeachment purposes, in accord with *State v. Swinburne*, 116 Ariz. 403, 569 P.2d 833 (1977).[5] Nonetheless, the trial court felt itself bound by *Routhier* to grant the motion to suppress, to the extent that the confession could not be used in the state's case-in-chief. (*Id.* at 43-46.) The prosecutor was permitted to dismiss the case without prejudice in order to appeal the suppression motion. (*Id.* at 60-61.)

The Arizona Court of Appeals affirmed the suppression order. It noted that no Fifth Amendment decision by

[5]In *Swinburne* the Arizona Supreme Court followed this Court's decision in *Harris v. New York*, 401 U.S. 222 (1971), which permitted a voluntary but *Miranda*-violative statement to be used to impeach a testifying defendant. The trial court's reference to *Swinburne* therefore amounts to an implicit finding that Roberson's statement to Cota-Robles was voluntary. Roberson did not testify at the suppression hearing so Cota-Robles' testimony that no threats or promises were employed, that Roberson's responses to questions were appropriate, and that the tone of the interview was "relaxed and conversational" (R.T. of April 3, 1986, at 14, 21) is uncontroverted.

this Court had addressed the issue of interrogation initiated by the police about a second, unrelated, case after invocation of the right to counsel had occurred in the original case, and since it did not believe that this Court's recent Sixth Amendment decisions had any application, it followed the *Routhier* rule that such questioning is a violation of *Edwards*. The State petitioned the Arizona Supreme Court for review on the basis that the *Routhier* rule was an unjustified expansion of *Edwards* which contradicted a variety of this Court's more recent decisions, but that petition was denied. A petition for writ of certiorari was filed in this Court, which granted the petition on December 7, 1987.

—o—

SUMMARY OF THE ARGUMENT

The Arizona courts in this case excluded from use in the prosecutor's case-in-chief a defendant's statements, which were both voluntary and given after proper warning and waiver as required by *Miranda v. Arizona*, 384 U.S. 436 (1966). This exclusion was premised on the fact that (unbeknown to the interviewer), 3 days before the interview in which the statement at issue had been given, the defendant had invoked his right to counsel to a different officer, in the course of a wholly separate investigation, and had remained continuously in custody without seeing a lawyer. An Arizona case called *State v. Routhier*, 137 Ariz. 90, 669 P.2d 68 (1983), purportedly applying this Court's decision in *Edwards v. Arizona*, 451 U.S. 477 (1981), had held that once a defendant asked to speak with

an attorney, all subsequent police-initiated statements were subject to exclusion, even if the questions asked related to an investigation wholly separate from the one in which the defendant had requested counsel. Therefore, applying *Routhier*, the Arizona courts forbade use of the statement obtained in this case, except as impeachment.

The brief which follows argues first that the *Edwards per se* rule excluding statements given in a police-initiated interview after counsel has been requested cannot properly be applied to a case where the subsequent interview is part of a wholly separate investigation. This Court has repeatedly refused to extend *Miranda*, the progenitor of *Edwards*. *Routhier*, however, extended and distorted *Edwards* (a one-investigation case) by excluding a statement concerning one investigation (in which the defendant had asked for counsel) that was volunteered during an interview concerning a completely *separate* investigation, in which counsel had not been requested. The present case goes even beyond *Routhier* in its distortion of *Edwards* by excluding a statement that not only was *developed* in an investigation completely separate from the one in which counsel had been requested, but *related* solely to that separate investigation. Such extension disregards not only the facts of *Edwards* and *Miranda* (both of which were one-investigation cases), but their rationale as well, because good faith pursuit of an investigation separate from the one in which counsel is requested cannot reasonably be expected to produce the kind of "badgering" those cases were intended to prevent. Thus, *Routhier/Roberson* cut *Edwards* completely adrift from its facts and its logic.

This brief, in its second argument, undertakes a detailed examination of this Court's primary post-*Miranda*

confession cases. This survey demonstrates that this Court has repeatedly indicated, both implicitly and explicitly, that multiple investigation cases are *not* to be treated the same as single investigation cases. Those decisions, especially a companion case to *Miranda* called *Westover v. United States*, *Michigan v. Mosley*, 423 U.S. 96 (1975), *Oregon v. Elstad*, 470 U.S. 298 (1985), and *Connecticut v. Barrett*, — U.S. —, 107 S.Ct. 828 (1987), leave no doubt that *Edwards* should not be extended to exclude statements developed in investigations separate from the one in which counsel was requested. Therefore, particularly in view of the "independent source" doctrine, it is concluded that the interpretive path taken by the Arizona courts, exemplified by the exclusionary order in this case, deviates unacceptably from a proper understanding of *Edwards*.

The final argument takes a critical look at the *Edwards per se* rule against police initiation. That discussion demonstrates that this Court does not consider the *Edwards* rule to be essential to trustworthy interrogation or a fair trial; that subsequent decisions by this Court have severely undercut the factual and legal basis for that *per se* exclusionary rule; that *Edwards* has not provided the simple, "bright line", rule it was intended to give; and that the *per se* rule does not meet this Court's own standards for a constitutionally acceptable inference. It therefore is argued that, even though the present case is sufficiently distinguishable that *Edwards* should not be applied to it, the Court would be wiser to drop the *Edwards per se* rule altogether, and apply instead the traditional waiver test of *Johnson v. Zerbst*, 304 U.S. 458 (1938).

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ARGUMENTS

I.

THE APPROACH TO EDWARDS v. ARIZONA TAKEN IN RECENT ARIZONA DECISIONS ON MULTIPLE INVESTIGATION CASES SHOULD BE REJECTED BY THIS COURT, BECAUSE THAT APPROACH MISCONCEIVES EDWARDS AND UNJUSTIFIABLY EXTENDS IT BEYOND ITS FACTS AND ITS RATIONALE.

In the case at bar the Arizona Court of Appeals believed it was following a previous decision of the Arizona Supreme Court, *State v. Routhier*, 137 Ariz. 90, 669 P.2d 68 (1983), which itself purported merely to apply this Court's decision in *Edwards v. Arizona*, 451 U.S. 477 (1981). However, *Routhier* actually goes beyond *Edwards*, and the present case goes even beyond *Routhier*. Because the *Routhier/Roberson* interpretation misconceives the proper ambit and application of *Edwards*, they must now be rejected by this Court. The extent to which the Arizona approach distorts this Court's doctrine can best be illustrated by beginning at the beginning, *Miranda v. Arizona*, 384 U.S. 436 (1966).

This Court decided *Miranda v. Arizona* and its companion cases some two decades ago, mandating therein the now familiar quartet of warnings to be administered to persons with whom the police desire to engage in custodial interrogation. During the intervening years the policy of the Court has generally been to clarify *Miranda* as needed, but not to extend it. This policy was noted by Chief Justice Rehnquist, then sitting as Circuit Justice, in his in-chambers opinion on application for stay in *Fare v. Michael C.*, 439 U.S. 1310, 1314 (1978):

> [T]his Court has been consistently reluctant to extend *Miranda* or to extend in any way its strictures on law enforcement agencies. I think this reluctance is shown by our decisions reviewing state-court interpretations of *Miranda*. As we noted in *Oregon v. Hass*, 420 U.S. 714, 719 (1975), "a State may not impose . . . greater [*Miranda*] restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them." (Emphasis in original.)

See also cases cited therein, 439 U.S. at 1314-15; *New York v. Quarles*, 467 U.S. 649, 658 (1984); *Colorado v. Connelly*, — U.S. —, 107 S.Ct. 515 (1986).

One of the few exceptions to this policy of not tampering with *Miranda* was *Edwards v. Arizona*, 451 U.S. 477 (1981), an extension by this Court rather than by some lower court. Robert Edwards was arrested for robbery, burglary, and murder, all of those charges aising out of one incident. (451 U.S. at 478; *State v. Edwards*, 122 Ariz. 206, 209, 594 P.2d 72, 75 (1979).) After being properly warned pursuant to *Miranda*, Edwards submitted to police questioning, which was terminated when he said, "I want an attorney before making a deal." (451 U.S. at 478-79.) The next day two detectives came to the jail where Edwards was being held, and when Edwards said that he did did not want to talk to anyone, the guard told him that he "had to" talk to them and took Edwards to the detectives. (*Id.* at 479.) After being rewarned pursuant to *Miranda*, Edwards agreed to talk to them and ultimately implicated himself in the crimes, though he declined to be tape re-

corded. (*Id.*) This Court concluded that his statement should be suppressed, promulgating a new procedural rule which went beyond its holding in *Miranda*.

> [A]lthough we have held that after initially being advised of his *Miranda* rights, the accused may himself validly waive his rights and respond to interrogation, see *North Carolina v. Butler*, *supra*, [441 U.S. 369] at 372-376, the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

(*Id.* at 484-85; footnote omitted.)

Thus, even in reaching its *Edwards* holding the Court had taken a pair of substantial jurisprudential leaps. First, in *Miranda*, it promulgated a whole set of "prophylactic" rules in aid of a defendant's Fifth Amendment privilege, even though such rules were not constitutionally required. *Michigan v. Tucker*, 417 U.S. 433 (1974). Then, in *Edwards*, it ruled that after a defendant's invocation of the *Miranda*-generated right to counsel during custodial interrogation, the police could not question the defendant again unless counsel had been made available or the accused himself "initiated" the conversation. However,

"*Edwards* was not a necessary consequence of *Miranda*." *Solem v. Stumes*, 465 U.S. 638, 648 (1984). Given this Court's general reluctance to expand *Miranda*, it is unreasonable to believe that its extension even beyond the facts of *Edwards* was ever contemplated.

The *Edwards* case had involved reinterrogation of a defendant about the *same* crime about which he was being questioned when he had invoked his right to counsel, by detectives out of the very same section as those to whom Edwards had made his invocation of the right. (122 Ariz. at 209, 594 P.2d at 75.) However, *State v. Routhier*, *supra*, involved a very different scenario. Dennis Routhier had killed one man and injured another with blows from a hammer (Lawrence and Robert Barrick), but was himself injured and taken into custody after an automobile accident which occurred as he fled from the police. (137 Ariz. at 93, 669 P.2d at 71.) He was initially questioned by Detective Barber on September 21, 1980, at Good Samaritan hospital, but that interview ended when Routhier said that he wanted to speak to an attorney. (137 Ariz. at 93-94, 669 P.2d at 71-72.) Three days later, after Routhier had been transferred to the detention ward at Maricopa County Hospital, but before counsel had been provided to him, he was approached by another detective, named Locksa. Locksa was aware of the previous request for counsel, so he specifically told Routhier that he wanted to discuss two unrelated homicides, *not* the Barrick crimes, and then gave a new set of *Miranda* warnings. (137 Ariz. at 94, 669 P.2d at 72.) Routhier said he was willing to talk to Detective Locksa, but "In response to Detective Locksa's questions regarding these unrelated homicides, [Routhier] implicated himself in the Barrick homicide." (*Id.*)

The Arizona Supreme Court, declining a suggestion that the case should be controlled by *Michigan v. Mosley*, 423 U.S. 96 (1975), relied solely upon *Edwards*. It held that the factual difference that the renewed questioning in *Routhier* pertained to an offense other than the one in view when the right to counsel had been invoked lacked "any legal significance for fifth amendment purposes", so *Edwards* applied, and the statement could not be used during the prosecution's case in chief. (137 Ariz. at 96-98, 669 P.2d at 74-76.) Thus, *Routhier* applied *Edwards* to a factual situation which nothing in *Edwards* indicates was ever contemplated by this Court, thereby taking the jurisprudence of confessions yet another step away from its Fifth Amendment roots—to preclude direct use of a properly "*Mirandized*" statement, after the officer specifically said he didn't want to discuss the case regarding which the right to counsel had previously been invoked, and the defendant "willing[ly]" talked without ever reinvoking his rights on the new case.

The final extension has occurred in the present case, which (without providing additional reasoning or even noticing the further leap it is making) goes even beyond *Routhier*. As pointed out in the Statement of the Case, *supra*, not only did Detective Cota-Robles *question* Roberson about a case unrelated to the one on which he had invoked and then waived his rights, but the *answers* all pertained to that unrelated case. The detective didn't even know of the invocation of rights on April 16. Roberson talked willingly, never invoked his rights, never mentioned his previous invocation of rights. The trial court specifically found that the statement was in no way a fruit of the April 16 violation of Roberson's right to counsel, and that "there's nothing wrong with what [the detective] has done except for the fact that the man had invoked his right to counsel earlier." (R.T. of April 3, 1986, at 50.)

It appears that the Arizona courts have succumbed to an approach closely akin to "the domino method of constitutional adjudication . . . wherein every explanatory statement in a previous opinion is made the basis for an extension to a wholly different situation." Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L.REV. 929, 950 (1965), quoted in *Miranda v. Arizona*, 384 U.S. at 514 (Harlan, J., dissenting). This Court has repeatedly emphasized that *Miranda's* requirements should not be extended in ways that "would cut this Court's holding in that case completely loose from its own explicitly stated rationale", *Beckwith v. United States*, 425 U.S. 341, 345 (1976), and presumably the same admonition applies to *Edwards*. Nonetheless, that is precisely what *Routhier* and now *Roberson* are doing—by focusing on decontextualized language while slipping the anchor of the rationale for *Miranda* and *Edwards*, they have drifted to conclusions that this Court surely could not have intended to result from those decisions.

A major concern in *Miranda* was repetitive interrogation that would eventually wear down the subject's resistance to making self-incriminatory statements. "To permit the continuation of custodial interrogation after a momentary cessation would clearly frustrate the purposes of *Miranda* by allowing repeated rounds of questioning to undermine the will of the person being questioned." *Michigan v. Mosley*, *supra*, 423 U.S. at 102. This same

concern is at the heart of *Edwards*. The *Edwards* prohibition on the police initiating more interrogation after an arrestee requested counsel "was in effect a prophylactic rule, designed to protect an accused in police custody from being badgered by police officers in the manner in which the defendant in *Edwards* was." *Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983); *see also Smith v. Illinois*, 469 U.S. 91, 99, n. 8 (1984). However, the chances that an accused will be questioned so repeatedly and in such quick succession that it will "undermine the will" of the person questioned, or will constitute "badger[ing]", are so minute as not to warrant consideration, if the officers are truly pursuing separate investigations. Indeed, permitting the police to inquire of an arrestee about investigations which are truly separate from the one on which he invoked his right to counsel should reassure him that his "right to choose between silence and speech remains unfettered through the interrogation process". (*Miranda v. Arizona*, 384 U.S. at 469.) The restraint of the officers in not questioning about the offense which the person's invocation of counsel has placed off-limits "will show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it." (*Id.* at 468.) In the meantime, however, as demonstrated by cases like *Routhier* and *Roberson*, the unwarranted extension of the *Edwards per se* rule of exclusion generates none of the benefits which can be "thought to outweigh the burdens . . . impose[d] on law enforcement agencies and the courts by requiring the suppression of trustworthy and highly probative evidence even though the confession might be voluntary under traditional Fifth Amendment analysis." *Fare v. Michael C.*, 442 U.S. 707, 718 (1979).

In the past this Court has cautioned against expanding "currently applicable exclusionary rules by erecting additional barriers to placing truthful and probative evidence before state juries. . . ." *Lego v. Twomey*, 404 U.S. 477, 488-89 (1972). That, however, is precisely what the *Routhier/Roberson* approach does—expand the *Edwards* exclusionary rule into an area not clearly contemplated by that decision. Judge Learned Hand warned that, "The suppression of truth is a grievous necessity at best, more especially when as here its inquiry concerns the public interest; it can be justified at all only when the opposed private interest is supreme." *McMann v. Securities and Exchange Commission*, 87 F.2d 377, 378 (2d Cir. 1937), *cert. denied*, 301 U.S. 684. That there is such a "supreme" interest in precluding voluntary confessions because of an invocation of rights in a wholly separate investigation seems impossible to demonstrate. The actions of the Arizona courts in *Routhier* and *Roberson* bring to mind the warning of Justice Jackson in *Douglas v. Jeannette*, 319 U.S. 157, 181 (1943) (separate opinion) about a court that "is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added." *Routhier* and *Roberson* are already two stories too many, and this Court should remove the excrescences before they do damage to the "temple". The *Routhier/Roberson* approach misapplies *Edwards*, and this Court should plainly say so.[6]

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[6]While this Court's "interpretative duties go well beyond deferring to the numerical preponderance of lower court decisions", *Moran v. Burbine*, 475 U.S. 412, 427 (1986), the Court nonetheless has occasionally found such a preponderance of

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II.

THIS COURT'S CASES CONSISTENTLY RECOGNIZE SEPARATE INVESTIGATIONS AS DISTINCT ENTITIES FOR PURPOSES OF DETERMINING THE ADMISSIBILITY OF CONFESSIONS, SO THE ROUTHIER-ROBERSON APPROACH DEVIATES FROM THIS COURT'S DOCTRINE.

The foregoing argument shows that the *Routhier/Roberson* approach misperceives the facts and reasoning essential to *Miranda* and *Edwards* when it extends *Edwards* to prohibit police initiation of communications about crimes distinct from the one in view when the accused invoked his right to counsel. However, it must also be recognized that many other of the Court's confession decisions show, either directly or by implication, that a distinction must be drawn between situations involving only one investigation and situations involving multiple investigations, and that the *Edwards* ban on police initia-

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lower court understanding to be a factor worthy of note in arriving at its own conclusions. *See, e.g., North Carolina v. Butler,* 441 U.S 369 (1979). It therefore may be of interest that the appellate courts in a number of jurisdictions have concluded (many of them post-*Routhier*) that *Edwards* does *not* bar questioning about unrelated offenses. *See Lofton v. State,* 471 So.2d 665 (Fl.App. 1985), *rev. denied,* 480 So.2d 1294; *State v. Harriman,* 434 So.2d 551 (La.App. 1983); supervisory writ denied, 440 So.2d 551 (La. 1983), *cert. denied,* 106 S.Ct. 1958 (1986); *State v. Dampier,* 333 S.E.2d 230 (N.C. 1985) (notes but declines to follow *Routhier*); *State v. Newton,* 682 P.2d 295 (Utah 1984); *McFadden v. Commonwealth,* 300 S.E.2d 924 (Va. 1983); *State v. Cornethan,* 684 P.2d 1355 (Wash.App. 1984); *cf. State v. Taylor,* 643 P.2d 379, 382 (Or.App. 1981) (assumes without deciding that custodial conversations after invocation of the right to counsel may be permissible if concerned with matters unrelated to the one on which the right was invoked).

tion of additional interrogation should not be applied to the latter class.

A. Implications of Westover v. U.S. and Michigan v. Mosley. Although the Court has had few occasions on which the difference between single investigation and multiple investigation situations has been directly presented to it, the Court has clearly recognized at least twice that this is a highly significant distinction. That such a distinction should be drawn was first indicated by the Court's discussion of *Westover v. United States,* one of the companion cases to *Miranda v. Arizona.* Westover was arrested by Kansas City police on local robbery charges, but was also wanted by the FBI because of some California bank robberies. He was held and interrogated by the Kansas City police for about 14 hours, who gave him no rights warnings, and who eventually turned him over to the FBI when he admitted nothing. Without removing him from the Kansas City police building, the FBI agents gave Westover their standard pre-*Miranda* rights warning, questioned him about the California robberies, and after about 2 hours obtained confessions to the California crimes. In reversing the convictions which occurred in the trials where those confessions were admitted, this Court stated:

> We do not suggest that law enforcement authorities are precluded from questioning any individual who has been held for a period of time by other authorities and interrogated by them without appropriate warnings. *A different case would be presented if an accused were taken into custody by the second authority, removed both in time and place from his original surroundings, and then adequately advised of his rights and given an opportunity to ex-*

> *ercise them.* But here the FBI interrogation was conducted immediately following the state interrogation in the same police station—in the same compelling surroundings. Thus, in obtaining a confession from Westover the federal authorities were the beneficiaries of the pressure applied by the local in-custody interrogation. In these circumstances the giving of warnings alone was not sufficient to protect the privilege.

(384 U.S. at 496-97; footnote omitted; emphasis added.)

The facts of the present case are almost identical to the situation hypothecated in *Westover* in which the Court said that the confessions would be admissible. Roberson was questioned on April 19 about a burglary which was wholly separate from the one about which he was being interrogated when he invoked his rights to Officer Perez on April 16. Although Detective Cota-Robles, who approached Roberson on April 19, was a member of the same department as Officer Perez, he was a detective (not a uniformed officer) and belonged to a unit different from the one whose detectives had questioned Roberson on April 16. Cota-Robles questioned Roberson at the Pima County Jail; the previous questioning had been conducted at the scene of the arrest and at the Eastside police substation. Cota-Robles' questioning of Roberson was separated by at least 2 days from any other interrogation. Roberson was fully "advised of his rights and given an opportunity to exercise them", not once but several times before he gave his statement to Cota-Robles. Although this Court found that the FBI agents in *Westover* were "the beneficiaries of the pressure applied by the local in-custody interrogation" (384 U.S. at 497), the trial court in this case specifically found that no nexus

existed between Roberson's confession to Cota-Robles on April 19 and the preceding events. Thus, *Miranda* itself, as explained in *Westover*, requires the admission of Roberson's statement.

This Court was directly confronted with a multiple-investigation situation in *Michigan v. Mosley, supra.* Richard Mosley was arrested as a result of a tip, questioned by a member of the Detroit Police Department's Armed Robbery Section about two robberies, and placed in a holding cell after he said he did not want to answer questions about the robberies. (423 U.S. at 97.) Several hours later he was brought to a different office, advised of his *Miranda* rights by a detective of the Homicide Bureau, waived his rights, was questioned about a separate offense (a homicide perpetrated in the course of an attempted robbery), and within 15 minutes gave an inculpatory statement. (*Id.* at 97-98.) This Court held that Mosley's statement was correctly admitted into evidence, despite the seemingly unequivocal language of *Miranda* that, "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease" (436 U.S. at 473-74), because, properly understood, this passage required only that the accused's exercise of his right to cut off questioning be "scrupulously honored". *Michigan v. Mosley,* 423 U.S. at 100-04. The Detroit police *had* "scrupulously honored" Mosley's invocation of the right to silence:

> [T]he police here immediately ceased the interrogation, resumed questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, *and restricted the second in-*

terrogation to a crime that had not been a subject of the earlier interrogation.

(423 U.S. at 106; emphasis added.)

Thus, the fact that the police renewed interrogation after an invocation of rights by means of questioning that was "restricted . . . to a crime that had not been a subject of the earlier interrogation" was crucial to the majority's resolution of the case. Moreover, Justice White concurred in the result. He was unwilling to join in the majority opinion, because he felt that it implied that statements resulting from interrogations renewed sooner than had been the case with Mosley might still be held to be automatically inadmissible, even though the statements were made as the result of an informed and voluntary decision. (423 U.S. at 107-11). He concluded:

> Thus, in order to achieve the majority's only stated purpose, it is sufficient to exclude all confessions which are the result of involuntary waivers. To exclude any others is to deprive the factfinding process of highly probative information for no reason at all. The "repeated rounds" of questioning following an assertion of the privilege, which the majority is worried about, would, of course, count heavily against the State in any determination of voluntariness—particularly if no reason (such as new facts communicated to the accused *or a new incident being inquired about*) appeared for repeated questioning. There is no reason, however, to rob the accused of the choice to answer questions voluntarily for some unspecified period of time following his own previously contrary decision. The Court should now so state.

(*Id.* at 111; emphasis added.)

In short, in *Mosley* seven members of the Court considered the fact that renewed questioning was about a

separate offense to be highly significant in determining whether statements were admissible. If anything, the facts show that Roberson's right to cut off questioning was more "scrupulously honored" than was Mosley's. That Roberson was questioned about a truly separate offense is certain, while the degree of separateness in *Mosley* has been questioned. (*See* Justice Brennan's dissent, 423 U.S. at 118-19.) Unlike Mosley, Roberson was subjected to no police trickery of any kind. (*See* 423 U.S. at 98 and n. 3.) The 3-day lapse of time between Roberson's invocation of his rights and the questioning by Detective Cota-Robles was far greater than the 2 hours in *Mosley*. Therefore, almost every element which made the statement admissible in *Mosley* is present with even greater force in this case, so *Mosley* strongly supports the proposition that *Edwards* and its *per se* rule (which are based on *Miranda*) should not apply to a multiple investigation situation such as this one.

B. Edwards v. Arizona. This conclusion is not directly contradicted by anything in *Edwards v. Arizona* which, as we have already seen, did not involve or address a multiple investigation situation. *Edwards* does run counter to the position taken by Arizona in the present case only to the extent that *Edwards* relies on language from *Miranda* and *Mosley* which suggests that the right to counsel should be more carefully protected than the right to silence. (*See Edwards v. Arizona*, 451 U.S. at 484-85.) However, even accepting that suggestion, it is far from evident that providing a greater *intensity* of safeguards also requires a greater *extension* of safeguards. Thus, that *Edwards* opted for a rule rigidly excluding police-initiated interrogation in a particular case

if counsel is requested, rather than taking a more flexible voluntariness approach, does not logically require a reading of *Edwards* that also bans further questioning on *other* cases, rather than just the one about which the arrestee was being interrogated when he invoked the right to counsel. It is entirely reasonable and consistent to apply strengthened protections in one plane without necessarily adding protections on the other plane. *Cf. Connecticut v. Barrett*, — U.S. —, 107 S.Ct. 828 (1987) (giving a broad interpretation to an ambiguous request for counsel does not require disregarding the sense of a clear but limited request).

The continued development of this Court's jurisprudence of confessions indicates, repeatedly and in a variety of ways, that the *Edwards* rule has not been and should not be applied to bar police-initiated questioning on an investigation separate from the one where the right was invoked. Indeed, in the Powell-Rehnquist concurrance to *Edwards* itself it was hinted that even the right to silence/right to counsel dichotomy discussed in *Mosley* (where, after all, it was dictum, because not necessary to the outcome of the case) was not particularly meaningful or necessary:

> The facts of *Mosley* differ somewhat from the present case because here petitioner had *requested counsel*. It is nevertheless true in both cases that "a blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances, would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests." *Id.*, at 102 (opinion of STEWART, J.)

(451 U.S. at 491, n. 1; emphasis in original.)

C. The impact of Oregon v. Elstad. Perhaps the strongest single indication that this Court is unwilling to expand *Edwards* to multiple investigation cases can be found in *Oregon v. Elstad*, 470 U.S. 298 (1985). Michael Elstad took part in the burglary of a neighbor's house. When police detectives first questioned Elstad in his home they gave him no *Miranda* warnings, and he made a statement incriminating himself. (*Id.* at 300-01.) He then was transported to the police station, properly advised of his rights, and he provided a detailed confession. (*Id.* at 301-02.) The trial court excluded the first statement but admitted the full confession, finding that it was not tainted by the first statement, and had been made "freely, voluntarily, and knowingly". (*Id.* at 302.) The Oregon appellate courts disagreed, holding that even the full confession should have been suppressed, so review in this Court was sought and granted. (*Id.* at 302-03).

Elstad first argued that the confession should be suppressed because it supposedly was "tainted fruit of the poisonous tree" of the *Miranda* violation. (*Id.* at 303.) This Court rejected that argument because *Miranda* sweeps more widely than does the Fifth Amendment, and the implementation of such a prophylactic rule need not mimic the enforcement of an actual constitutional provision. (*Id.* at 303-08.)

> In deciding "how sweeping the judicially imposed consequences" of a failure to administer *Miranda* warnings should be, 417 U.S., at 445, the *Tucker* Court noted that neither the general goal of deterring improper police conduct nor the Fifth Amendment goal of assuring trustworthy evidence would be

served by suppression of the witness' testimony. The unwarned confession must, of course, be suppressed, but the Court ruled that introduction of the third-party witness' testimony did not violate Tucker's Fifth Amendment rights.

We believe that this reasoning applies with equal force when the alleged "fruit" of a noncoercive Miranda violation is neither a witness nor an article of evidence but the accused's own voluntary testimony. As in *Tucker*, the absence of any coercion or improper tactics undercuts the twin rationales—trustworthiness and deterrence—for a broader rule. Once warned, the suspect is free to exercise his own volition in deciding whether or not to make a statement to the authorities.

* * *

"[P]olicemen investigating serious crimes [cannot realistically be expected to] make no errors whatsoever." *Michigan v. Tucker, supra*, at 446. If errors are made by law enforcement officers in administering the prophylactic *Miranda* procedures, they should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself. It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warning, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. *Though Miranda requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.*

(*Id.* at 308-09, emphasis added.)

The implications for the present case are inescapable. Roberson actually was given his *Miranda* warnings in the

field, but a noncoercive violation occurred when he was questioned on April 16 after he had invoked his right to counsel. Therefore, the April 16 statements, the direct results of that violation, were suppressed. If anything, Michael Elstad was in a worse position, because he was not given any warnings at all before being questioned in the field; this noncoercive *Miranda* violation resulted in the suppression of his initial statement. However, such suppression satisfied *Miranda*, so his subsequent station-house confession was to be evaluated solely in terms of "whether it is knowingly and voluntarily made." (470 U.S. at 309.) Such an evaluation of Roberson's April 19 confession has, in effect, already been done by the trial court, which found it to be voluntary and trustworthy in the sense of *Harris v. New York*. There being no meaningful way to distinguish *Elstad* from the present case, it leaves no doubt that the April 19 confession should have been admissible against Roberson in the prosecution case in chief.

This conclusion is bolstered by *Elstad's* discussion of the "cat out of the bag" metaphor. Where the initial admission, though obtained in violation of *Miranda*, is "clearly voluntary" then "a careful and thorough administration of *Miranda* warnings serves to cure the condition that rendered the unwarned statement inadmissible." (470 U.S. at 310-11.) On the other hand, "When a prior statement is actually coerced, the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether the coercion has carried over into the second confession." (*Id.* at 310.) "Even in such extreme cases

as *Lyons v. Oklahoma*, 322 U.S. 596 (1944), in which police forced a full confession from the accused through unconscionable methods of interrogation, the Court has assumed that the coercive effect of the confession could, with time, be dissipated." (*Id.* at 311-12.)

The circumstances here (passage of time, change of place, change of interrogators), include all the factors which would serve to dissipate the coercive effect of even an *involuntary* initial statement, as well as the proper administration of *Miranda* warnings by Detective Cota-Robles, which would by itself "cure" an uncoerced and voluntary initial statement. Such a factual pattern will necessarily recur in virtually every case where an *Edwards* "violation" results from the police good-faithedly pursuing an investigation separate from the one where the counsel right was invoked. *Elstad* would seem to leave no choice but to hold statements given in such separate investigations completely admissible.

D. Limited invocation of the right to counsel—Connecticut v. Barrett. Yet another important indicator of this Court's understanding of how far *Edwards* can properly be applied is the very recent decision in *Connecticut v. Barretts*, — U.S. —, 107 S.Ct. 828 (1987). Barrett attacked the admissibility of an otherwise knowing and voluntary oral confession he had made to the police, after telling them he was willing to talk about the charges "verbally but he did not want to put anything in writing until his attorney came". (*Id.* at 830-31.)

> The trial court found that this decision was a voluntary waiver of his rights, and there is no evidence that Barrett was "threatened, tricked, or cajoled" into this waiver. *Miranda*, 384 U.S., at 476, 86 S.Ct., at 1628. The Connecticut Supreme Court nevertheless held as a matter of law that respondent's limited invocation of his right to counsel prohibited all interrogation absent initiation of further discussion by Barrett. *Nothing in our decisions, however, or in the rationale of Miranda, requires authorities to ignore the tenor or sense of a defendant's response to these warnings.*

(107 S.Ct. at 831; emphasis added.)

> The Connecticut Supreme Court's decision . . . rested on the view that requests for counsel are not to be narrowly construed. . . . We do not denigrate the "settled approach to questions of waiver [that] requires us to give a broad, rather than a narrow, interpretation to a defendant's request for counsel," *Michigan v. Jackson*, 475 U.S. —, —, 106 S.Ct. 1404, —, 89 L.Ed.2d 631 (1936), when we observe that this approach does little to aid respondent's cause. *Interpretation is only required where the defendant's words, understood as ordinary people would understand them, are ambiguous. Here, however, Barrett made clear his intentions, and they were honored by police. To conclude that respondent invoked his right to counsel for all purposes requires not a broad interpretation of an ambiguous statement, but a disregard of the ordinary meaning of respondent's statement.*

(*Id.* at 832; footnotes omitted; emphasis added.)

This holding recognized the validity of limited invocations of the right to counsel. The "ordinary meaning" of Roberson's request for counsel to Officer Perez necessarily was an invocation limited to the incident on which he had just been arrested, because Roberson had no way of knowing that 3 days later different police following separate leads would want to talk to him about a wholly distinct crime. These subsequent events cannot render

ambiguous what was unambiguous at the time Roberson's words were spoken. *Cf. Smith v. Illinois*, 469 U.S. 91 (1984) (accused's request for counsel cannot be rendered ambiguous by his subsequent remarks). Since the invocation was thus limited, the effects of any violation necessarily must be similarly limited, and could not invalidate the statement given to Cota-Robles on an offense as to which counsel had not been invoked.

E. Michigan v. Jackson, Maine v. Moulton, and Moran v. Burbine. Some notice must be taken of *Michigan v. Jackson*, 475 U.S. 625 (1986). There this Court held that *Edwards*, which is itself grounded in the Fifth Amendment, should be applied by analogy in a Sixth Amendment context, so that if an accused requests counsel during an arraignment or similar proceeding, subsequent initiation of interrogation by the police is barred by *Edwards*, and any waiver of the right to counsel is invalid. It is not clear from the record before this Court whether Roberson had been formally arraigned on the April 16 burglary (CR-15268) at the time he was interviewed by Detective Cota-Robles on April 19, though it is virtually certain that he had requested assignment of counsel before that interview.[7]

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[7]Under Arizona law, the "arraignment" (i.e., entrance of a plea) may or may not take place at the time of the defendant's initial appearance. Arizona Rule of Criminal Procedure 14.3. The initial appearance occurs within 24 hours of the arrest or the person must be released, and at the initial appearance counsel is assigned for indigent persons who request counsel. (Arizona Rules of Criminal Procedure 4.1 and 4.2) Roberson was still in jail 3 days after the April 16 arrest, and he was later found indigent and assigned the Public Defender as counsel in CR-16041 (the full record of which is before this Court). (R. at 16.) We may therefore safely assume that he likewise was indigent, and requested and was assigned counsel during the initial appearance on CR-15268, which must have occurred before the April 19 interview.

Assuming arguendo that *Michigan v. Jackson* activated *Edwards*, so as to shield Roberson from police-initiated interrogation in CR-15268, the very Sixth Amendment jurisprudence on which *Jackson* relies leaves no doubt that no such protection was triggered in the wholly separate case now before this Court. *Michigan v. Jackson* does not alter the settled rule that Sixth Amendment protections arise only after formal initiation of proceedings, so that "a person who had previously been just a 'suspect' has become an 'accused' within the meaning of the Sixth Amendment." (475 U.S. at 632.) No charges had been formally commenced against Roberson in CR-16041 when he was interviewed on April 19, and the presumed request for counsel in CR-15268 could not serve to trigger *Jackson/Edwards* protections in the separate case. In *Maine v. Moulton*, 474 U.S. 159 (1985), the question was admissibility of statements made to an informer. This Court held that statements about charges on which the defendant already had been indicted had to be excluded, because obtaining them violated the right to counsel, but statements on new charges, where the right to counsel had not attached, were admissible:

> [*To*] *exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities.* Consequently, incriminating statements pertaining to pending charges are inadmissible at the trial of *those* charges, not withstanding the fact that the police were also investigating other crimes, if, in obtaining this evidence, the State violated the Sixth Amendment

by *knowingly circumventing* the accused's right to the assistance of counsel.[16]

[16] *Incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses.*

(474 U.S. at 180; emphasis added.)

Thus, statements concerning different offenses were specifically held subject to differing treatment, even when developed simultaneously by one person in the course of a single investigation. A fortiori, statements about different offenses, developed at different times, by different investigators, in the course of two wholly independent investigations, should not be treated the same. Inasmuch as there was no nexus whatever between the statements given in this case and the statements given in the case on which Roberson was originally arrested and interrogated, the statements offered in this case should be examined by themselves. Since there was no involuntariness or failure to comply with *Miranda* and *Edwards* in *this* investigation, the statements given should be entirely admissible. This is especially true because there was no *knowing* circumvention of Roberson's right to counsel; on the contrary the police followed *Miranda* to the letter and had no idea that the right to counsel had been invoked.

This conclusion is reinforced by *Moran v. Burbine*, 475 U.S. 412 (1986), which held that a confession is admissible, even if the defendant's lawyer is not permitted to contact the defendant, when the defendant makes an otherwise voluntary and intelligent rights waiver. *Moran* points out that society has a "compelling interest" in

obtaining confessions from lawbreakers; that the existence of a lawyer-client relationship on one charge does not create a Sixth Amendment right to the presence of counsel during interrogation on a different charge; and that the *Miranda* guarantee of the presence of counsel is triggered *only* by a request. (475 U.S. at 426, 430-31, and 433, n.4.) Roberson thus had no right to counsel already operative when the detectives approached him about the present case. To be protected he had to invoke the right, which he failed to do, so his statements are completely admissible.

F. Conclusion from the case law survey. This Court's post-*Miranda* cases on confessions constitute a substantial corpus. However, no part of that extensive body of decisions warrants precluding a voluntary statement, given after proper *Miranda* warnings, merely because the right to counsel has previously been invoked in a wholly separate investigation. Moreover, this Court's "independent source" case law, which has been applied to both Fifth and Sixth Amendment situations, militates strongly against exclusion in a multiple investigation case such as the present one.

> [T]he derivative evidence analysis ensures that the prosecution is not put in a *worse* position simply because of some earlier police error or misconduct. The independent source doctrine allows admission of evidence that has been discovered by means wholly independent of any constitutional violation. The independent source doctrine teaches us that the interest of so-

> ciety in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position than they would have been in if no police error or misconduct had occurred. See *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 79, 84 S.Ct. 1594, 1609, 12 L.Ed.2d 678 (1964); *Kastigar v. United States*, 406 U.S. 441, 457, 458-459, 92 S.Ct. 1653, 1663-1664, 32 L.Ed.2d 212 (1972). When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation.

Nix v. Williams, 467 U.S. 431, 443-44 (1984) (emphasis in original).

To suppress evidence which has no relation whatever to a prior police illegality is to effectively put the police in a worse situation than if there had been no error, and that, according to *Nix v. Williams*, is unacceptable. *Routhier/Roberson* plainly violates this altogether logical rule. The "independent source" doctrine applies to statements (whether of witnesses or suspects), not just tangible evidence. *United States v. Ceccolini*, 435 U.S. 268 (1977), and cases discussed therein. The questioning done by Detective Cota-Robles on April 19 concerning the April 15 burglary is obviously something that happened altogether independently of the improper resumption of questioning which occurred after the invocation of rights on April 16. No logic can justify suppression of the voluntary statements elicited at that time, so the exclusion of evidence ordered in this case must be reversed.

III.

THIS COURT SHOULD RECONSIDER EDWARDS, ABROGATE ITS PER SE RULE AGAINST POLICE INITIATION OF CONVERSATION AFTER A RIGHTS INVOCATION, AND APPLY INSTEAD THE TRADITIONAL WAIVER TEST OF JOHNSON v. ZERBST, 304 U.S. 458 (1938).

The two previous arguments have shown the Court that nothing in *Edwards v. Arizona* or its other decisions provides warrant for the exclusion of voluntary, properly "*Mirandized*" statements simply because the right to counsel had been invoked during a wholly separate investigation. Those arguments thereby provide an acceptable basis for overturning the particular order excluding evidence in this case, and for rejecting the erroneous interpretation of *Edwards* applied by the Arizona courts. There is, however, another approach available which would yield the same result for this case and would provide other benefits as well: reconsider and overrule *Edwards* itself, to the extent that it makes police initiation of contact after a rights invocation a *per se* violation rather than simply one datum in assessing the validity of a waiver.[8] Absent the *Edwards per se* rule the statement excluded in this case would, without question, be admissible.

There are a number of persuasive reasons for adopting this seemingly radical remedy. To begin with, it should be recalled that this Court has already acknowledged that "*Edwards* was not a necessary consequence of *Miranda*"

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[8]This suggestion was not presented to the Arizona courts for the obvious reason that they lacked the authority to modify *Edwards*.

(*Solem v. Stumes*, 465 U.S. at 648), let alone mandated by the constitution. In fact, the existence of *Edwards* is not really necessary for either a fair trial or a civilized interrogation process.

> The Edwards rule has only a tangential relation to truthfinding at trial. . . . The application of the exclusionary rule pursuant to *Edwards* is perhaps not as entirely unrelated to the accuracy of the final result as it is in the Fourth Amendment context. Yet *the Edwards rule cannot be said to be a sine qua non of fair and accurate interrogation*. . . . The fact that a suspect has requested a lawyer does not mean that statements he makes in response to subsequent police questioning are likely to be inaccurate. Most important, in those situations where renewed interrogation raises significant doubt as to the voluntariness and reliability of the statement and, therefore, the accuracy of the outcome at trial, it is likely that suppression could be achieved without reliance on the prophylactic rule adopted in Edwards.

(*Solem v. Stumes*, 465 U.S. at 643-44; emphasis added.) Substantial questions have been raised about this Court's authority to propound "prophylactic rules" which invalidate official conduct without an actual constitutional violation ever having been demonstrated. *See, e.g.*, Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III* Legitimacy, 80 Nw. U.L. Rev. 100 (1985). Even if the Court possesses the authority to promulgate rules like that in *Edwards*, it would seem that a necessary prerequisite to such rule-making would be a "powerful showing" that the "rules are plainly desirable in the context of our society . . . before those rules are engrafted onto the Constitution and imposed on every State and county in the land," *Miranda v. Arizona*, 385 U.S. at 515 (Harlan,

J., dissenting.) The luke-warm support for *Edwards* enunciated in *Solem v. Stumes, supra*, suggests that, however beneficial the *Edwards per se rule* may have looked prospectively, experience has shown it to be of minimal value. It should therefore be rescinded.

The case for modifying *Edwards* is now particularly strong because the Court seems to have had second thoughts about the importance of the critical fact in that case—Edwards' invocation of counsel. He did not request counsel for all purposes, or even to consult with before interrogation; he said, "I want an attorney before making a deal." (451 U.S. at 479.) If we accept those words in their ordinary sense, they appear legally indistinguishable from the limited invocation of counsel discussed by this Court in *Connecticut v. Barrett, supra*. But if Robert Edwards' invocation was *limited* (as it apparently was), and the police complied with it (as they did—no deal was discussed so 't was never necessary to provide a lawyer), there simply were no grounds for setting up what we now know as the "*Edwards* rule". The result might well have been the same in the absence of the *per se* rule, because of the potential for coercion in the jailer's remark that Edwards "had to" speak to the detectives (*see* Chief Justice Burger's concurrence), but *Barrett* has dissipated any factual basis for the "*Edwards* rule".

Edwards also appears ripe for reconsideration because a legal assumption which was fundamental to the decision—that the right to counsel should be more stringently protected than the right to silence—itself appears to be open to question. Whatever differences in historical development and theoretical underpinnings there may be be-

tween the two rights, *in the context of interrogation* they become essentially equivalent—the warning of the right to silence tells the arrestee that he need not speak, while the warning of the right to counsel tells the arrestee that he can consult with another man who will tell him not to speak.

> The Court's vision of a lawyer "mitigat[ing] the dangers of untrustworthiness" (*ante*, p. 470) by witnessing coercion and assisting accuracy in the confession is largely a fancy; for if counsel arrives, there is rarely going to be a police station confession. *Watts v. Indiana*, 338 U.S. 49, 59 (separate opinion of Jackson, J.): "[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances."

Miranda v. Arizona, 384 U.S. at 516 (Harlan, J., dissenting.) It makes no more sense to impose a differentiated system of protections for effectively equivalent rights than it would to establish graduated burdens of proof which distinquish between due process voluntariness and waivers of *Miranda's* "auxiliary protections". The latter theory was recently rejected by this Court in *Colorado v. Connelly*, — U.S. —, 107 S.Ct. 515 (1986). That the factual distinction between invoking the right to silence and invoking the right to counsel might be one that made no legal difference was suggested in the Powell-Rehnquist concurrence to *Edwards*. (451 U.S. at 491, n. 1.) It now is wholly reasonable for the entire Court to flatly say so.

Another reason for dispensing with the *Edwards per se* rule is that it simply has not proved to be the easily applied "bright-line rule" it was intended to be. The various opinions in *Oregon v. Bradshaw*, 462 U.S. 1039 (1983), show that this Court has not agreed even within itself

about the meaning of *Edwards'* critical concept, "initiation." Such internal division provides little guidance for the police and lower courts. *See* Note, *It's Better the Second Time Around—Reinterrogation of Custodial Suspects Under Oregon v. Bradshaw*, 45 U. PITT.L.REV. 899 (1984). The purpose for *Miranda* was "to give concrete constitutional guidelines for law enforcement agencies and courts to follow." (384 U.S. at 441-42.) This Court has declined to adopt a rule which would contribute only marginally to fulfilling *Miranda's* goals if the proposed rule would result in "muddying *Miranda's* otherwise relatively clear waters". *Moran v. Burbine*, *supra*, 475 U.S. at 425. The *Edwards per se* rule has shown itself to be more trouble than it's worth, so it should be dropped.

Elimination of the *Edwards per se* rule was described at the beginning of this argument as being only a "seemingly" radical remedy. That characterization is appropriate because the history of this Court's post-*Miranda* decisions has been a history of refining a substantial number of statements therein which subsequent experience and reflection showed to be in need of modification. *Miranda* repeatedly described itself in *constitutional* terms. For example, the majority opinion states that one reason for granting certiorari was "to give concrete constitutional guidelines for law enforcement agencies and courts to follow." (384 U.S. at 441-42.) However, the Court made clear in *Michigan v. Tucker*, 417 U.S. 433 (1974), that *Miranda's* procedures are *not* constitutionally required. As we have already seen, *Miranda* says quite flatly that if the right to silence is invoked, "the interrogation must cease" (384 U.S. at 474), but the Court in *Michigan v. Mosley* held that such cessation was not absolute or per-

manent, and that the police could renew questioning if the arrestee's right to silence was "scrupulously observed". *Miranda* said that, "An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver." (384 U.S. at 475.) It also said that, "No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given." (*Id.* at 470.) Nonetheless, *North Carolina v. Butler*, 441 U.S. 369 (1979), held that a waiver of the right to counsel does *not* have to be explicit. *Miranda* had said that, "By custodial interrogation, we mean questioning initiated by law enforcement officers . . . ", but *Rhode Island v. Innis*, 446 U.S. 291 (1980), concluded that "interrogation" actually encompasses more than just "questions".

This chronicle of adjustments shows that *Miranda* itself has not been classed with "the law of the Medes and the Persians, which may not be revoked" (Daniel 6:12); a fortiori, *Edwards*, which "was not a necessary consequence of *Miranda*" (*Solem v. Stumes*, 465 U.S. at 648), is plainly subject to appropriate changes. Such amendment is not precluded by the doctrine of stare decisis, for this Court has said:

> [W]e are not unmindful of the desirability of continuity of decision in constitutional questions. However, when convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions. This has long been accepted practice, and this practice has continued to this day. This is particularly true when the decision believed erroneous is the application of a constitutional principle rather than an interpretation of the Constitution to extract the principle itself.

Smith v. Allwright, 321 U.S. 649, 665-66 (1944) (footnotes omitted). The *Edwards per se* rule is an extension of a "prophylactic" procedural rule formulated to safeguard the exercise of a constitutional privilege. Correction of something at so many removes from the Constitution itself should give this Court no qualms.

The effect of the *Edwards per se* rule is to equate police initiation of conversation after a rights invocation with coercion and overreaching. Were the *Edwards* rule an inference utilized in some criminal statute this Court would strike it down immediately, for lack of connection with reality. An inference is " 'irrational' or 'arbitrary', and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend," *Leary v. United States*, 395 U.S. 6, 36 (1969). While the facts concerning "initiation" certainly are relevant, application of the traditional *Johnson v. Zerbst* totality of the circumstances approach would completely fulfill this Court's intent in protecting against the government coercion which is the basis for *Miranda* while avoiding the perpetuation of an irrational and unnecessary exclusionary rule. *Cf. Colorado v. Connelly, supra.* Therefore, this Court should so modify *Edwards*, and overrule the suppression order in this case.

———o———

CONCLUSION

It is abundantly clear that nothing in *Miranda*, *Edwards*, or the rest of this Court's jurisprudence of confessions warrants excluding from evidence the completely voluntary and properly warned admissions of a defendant merely because he previously had invoked his right to counsel in a wholly separate investigation. However, it also is plain that the very *per se* rule of *Edwards* which has been alleged to require such exclusion is itself undesirable and unsupportable. The best course would be for this Court to revisit *Edwards* and replace its *per se* rule with the traditional waiver rule of *Johnson v. Zerbst*, which would allow for consideration of police "initiation" in evaluating a waiver of the previously invoked right to counsel, but would not make "initiation", in Justice Powell's words, "the *sine qua non* to the inquiry". *Edwards v. Arizona*, 451 U.S. at 491 (Powell, J., concurring).

Such an approach would be consistent with this Court's recent admonition to itself to decide a case involving alleged police interrogation after invocation of the right to counsel "remember[ing] the purpose behind our decisions in *Miranda* and *Edwards:* preventing government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment." *Arizona v. Mauro*, — U.S. —, 107 S.Ct. 1931, 1936-37 (1987). At the very least the Court should declare, even if the *Edwards per se* rule is to be maintained, that it does not apply to police initiation of questioning in an investigation that is wholly separate from the one in which the defendant invoked his

right to counsel. Under either approach the exclusionary order issued in this case must be reversed.

Respectfully submitted,

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[redacted]

Petitioner,

v.

[redacted]

Respondent.

[redacted]

RESPONDENT'S BRIEF ON THE MERITS

ROBERT L. BARRASSO
(Appointed by this Court)
[redacted]

[redacted]

QUESTIONS PRESENTED FOR REVIEW

Did the trial court and the Court of Appeals properly hold that since the Respondent had invoked his Fifth Amendment right to counsel during his initial interrogation and counsel was never provided, that statements made by Respondent, pursuant to subsequent interrogation, must be suppressed?

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TABLE OF CASES AND AUTHORITIES

Respondent does not take issue with Petitioner's statement of the trial court and Court of Appeals holdings, its jurisdictional statement and its citation of the constitutional and statutory provisions involved.

STATEMENT OF THE CASE

For the purpose of simplification, Respondent will refer to the April 16, 1986 burglary as Crime One and the April 15, 1986 burglary as Crime Two.

On April 16, 1986, Respondent was arrested near the scene of a burglary which had occurred only moments earlier. At that time, he was advised of his *Miranda* rights by the arresting officer, Officer Perez, and "subject replied that he understood his rights and that he wanted a lawyer before answering any questions." (R.T. of April 3, 1986 at 26). After he invoked his right to counsel, another officer, Officer Garrison, questioned Mr. Roberson at the scene of the arrest regarding Crime One. (*Id.* at 23). Shortly thereafter, another officer, Detective Quinn, questioned Mr. Roberson at the scene of the arrest, again, regarding Crime One. (R.T. of October 17, 1985).

The officers transported Mr. Roberson to an eastside police substation, and there, Detective Quinn and another officer, Detective Wright, engaged in further interrogation of Mr. Roberson regarding Crime One. (*Id.* at 9-11).

Next, the officers booked Mr. Roberson and put him in jail. At this point, Mr. Roberson still had not been allowed to consult with counsel. The next day, still two more officers approached Mr. Roberson while he was in jail and further interrogated Mr. Roberson regarding Crime One.

On April 19, still in jail and having been in continuous custody, another group of officers, Detectives Cota-Robles, Quinn and Thorson, went out to the jail and interrogated Mr. Roberson about Crime Two. The detectives read to him his *Miranda* rights. Mr. Roberson stated

that he understood them and wanted to talk. Mr. Roberson had not spoken to a lawyer since his arrest on April 16, 1986. (R.T. of April 3, 1986 at pp. 3-7, 15-16).

The trial court and the Court of Appeals suppressed the statements made by Mr. Roberson during the April 19 questioning in the state's case-in-chief regarding Crime Two, finding the statements were obtained in violation of Mr. Roberson's Fifth Amendment rights. It is those statements made on April 19, regarding Crime Two, which are the subject of this appeal.

SUMMARY OF ARGUMENT

Miranda and *Edwards* clearly hold that a defendant's right to silence under the Fifth Amendment also entails the right to have an attorney present before speaking during custodial interrogation. The bright line rules of *Miranda* and *Edwards* require a finding that where a defendant remains in custody after requesting counsel, any subsequent interrogation would be unduly coercive and, therefore, statements made in subsequent interrogations must be suppressed. The subject matter of those interrogations is irrelevant under Fifth Amendment analysis since it is the voluntariness of the statements that is the issue. In the present case, Mr. Roberson clearly decided to speak to counsel before making statements to the officers and indicated as much to the police. He was then confined for several days and reinterrogated without speaking to a lawyer. The statements made during the subsequent interrogation were properly suppressed. The trial court and the Court of Appeals correctly held that the statements should be excluded from the State's case-in-chief. This Court should affirm the lower courts' decisions.

INTRODUCTION

Prior to engaging in an analysis of the Petitioner's specific arguments, it is important to recall some basic principles of American jurisprudence regarding criminal procedure laws grounded in the United States Constitution.

The Fifth Amendment to the United States Constitution provides that "No person . . . shall be compelled in any criminal case to be a witness against himself." This privilege against self-incrimination applies to the states pursuant to the Due Process Clause of the Fourteenth Amendment. *Malloy* v. *Hogan*, 378 U.S. 1, 84 S.Ct. 1489 (1964). Evidence obtained in violation of this privilege must be excluded from trial. *Edwards* v. *Arizona*, 415 U.S. 477, 485, 101 S.Ct. 1880 (1981).

In *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966), the Court quoted extensively from an early Fifth Amendment case, *Brown* v. *Walker*, 161 U.S. 591 (1896), to point out the reasons why the framers of the United States Constitution found it so imperative to provide each person the privilege against self-incrimination:

> Over 70 years ago our predecessors on this Court eloquently stated:
>
> > The maxim *nemo tenetur seipsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which [have] long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, [were] not uncommon even in England. While the admission or confessions of the prisoner, when voluntarily and freely made, have always ranked high

in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton, and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in English, as well as in American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment. *Brown* v. *Walker*, 161 U.S. 591, 596-597 (1896).

384 U.S. at 442-43. In the words of Chief Justice Marshall, by fixing the privilege against self-incrimination in the Constitution, the precious right was secured "for ages to come, and . . . designed to approach immortality as nearly as human institutions can approach it." *Cohens* v. *Virginia*, 6 Wheat. 264, 387 (1821).

Furthermore, the Court in *Escobedo* v. *Illinois*, 378 U.S. 485 (1963), recognized that American jurisprudence has traditionally taken a dim view of the State relying too

heavily on a suspect's confession to a crime. The Court stated:

> We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation. As Dean Wigmore so wisely said:
>
> > *"[A]ny system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby.* The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources. The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture. If there is a right to an answer, there soon seems to be a right to the expected answer,—that is, to a confession of guilt. Thus the legitimate use grows into the unjust abuse; ultimately, the innocent are jeopardized by the encroachments of a bad system. Such seems to have been the course of experience in those legal systems where the privilege was not recognized." 8 Wigmore, Evidence (3d ed. 1940), 309. (Emphasis in original.)
>
> This Court also has recognized that "history amply shows that confessions have often been extorted to save law enforcement officials the trouble and effort of obtaining valid and independent evidence . . . ." *Haynes* v. *Washington*, 373 U.S. 503, 519. (Footnotes omitted.)

378 U.S. at 488-90.

In *Miranda* v. *Arizona*, *supra*, the Supreme Court recognized that custodial interrogations generate "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.* at 467, 86 S.Ct. at 1624. To combat the compelling pressures which are involved in the very nature of custodial interrogations, and to provide an in-custody suspect a full opportunity to exercise his Fifth Amendment right against self-incrimination, the Court formulated a set of procedural safeguards in order to secure the privilege against self-incrimination. The Court in *Miranda* held that prior to initiating any questioning, the State must adequately and effectively apprise the suspect of his rights, "and the exercise of those rights must be fully honored." *Id.* *Miranda* goes on to say that when an accused requests to remain silent, "the interrogation must cease." If he states that he wants an attorney, "the interrogation must cease until an attorney is present." *Id.* at 473-74, 86 S.Ct. at 1627.

In *Edwards* v. *Arizona*, 451 U.S. 477, 101 S.Ct. 1880 (1981), the Court formulated another procedural safeguard designed to secure the privilege against self-incrimination. The Court in *Edwards* adopted the rule that when an accused has "expressed his desire to deal with the police only through counsel, [he] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id.* at 484-85, 101 S.Ct. at 1885.

In a later case, *Solem* v. *Stumes*, 465 U.S. 638, 104 S.Ct. 1338 (1984), the Court explained the effect of *Edwards:*

> *Edwards* established a bright line rule to safeguard pre-existing rights, not a new substantive requirement. Before and after *Edwards* a suspect had a right to the presence of a lawyer, and could waive that right. *Edwards* established a new test for when that waiver would be acceptable once the suspect had invoked his right to counsel: the suspect had to initiate subsequent communication.

465 U.S. at 646.

ARGUMENTS

I. THE TRIAL COURT AND THE COURT OF APPEALS PROPERLY HELD THAT MR. ROBERSON'S STATEMENTS COULD NOT BE USED IN THE PROSECUTION'S CASE-IN-CHIEF BY A CORRECT APPLICATION OF *MIRANDA* V. *ARIZONA* AND *EDWARDS* V. *ARIZONA*.

In *Miranda* and in the cases following *Miranda*, the Supreme Court has made a clear distinction among the cases in which an accused has merely invoked his right to remain silent and those cases in which he has invoked the right to counsel before answering questions. Where the accused simply asserts his right to remain silent, the police may resume custodial interrogation if the right of the accused to cut off questioning is scrupulously honored. *Michigan* v. *Mosley*, 423 U.S. 96, 96 S.Ct. 321 (1975); *Moran* v. *Burbine*, 475 U.S. 412, 106 S.Ct. 1135 (1986). On the other hand, where the accused requests counsel, the interrogation must immediately cease and it may not resume until the accused is provided with counsel. *Edwards* v. *Arizona*, 451 U.S. 477, 101 S.Ct. 1880 (1981). Discussing the difference between requesting counsel and merely remaining silent, the Court in *Edwards* stated:

> *Miranda*, itself indicated that the assertion of the right to counsel was a significant event and that once

exercised by the accused, "the interrogation must cease until an attorney is present." 384 U.S. at 474. Our later cases have not abandoned that view. In *Michigan* v. *Mosley*, the Court noted that *Miranda* had distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney and had required that interrogation cease until an attorney was present only if the individual stated he wanted counsel. In *Fare* v. *Michael C.*, the Court referred to *Miranda's* "rigid rule that an accused's request for an attorney is *per se* an invocation of his Fifth Amendment rights, requiring that all interrogation cease." And just last Term, in a case where a suspect in custody had invoked his *Miranda* right to counsel, the Court again referred to the "undisputed right" under *Miranda* to remain silent and to be free of interrogation "until he had consulted with a lawyer." *Rhode Island* v. *Innis*. *We reconfirm these views and, to lend them substance, emphasize that it is inconsistent with Miranda and its progeny for authorities at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel.* (Citations omitted). (Emphasis added).

451 U.S. at 485.

In a more recent case, *Moran* v. *Burbine*, 475 U.S. 412, 106 S.Ct. 1135 (1986), the Court again noted the distinction between a suspect's request for counsel and a request to remain silent:

> When a suspect *has* requested counsel, the interrogation must cease, regardless of any question of waiver, unless the suspect himself initiates the conversation. (Emphasis added).

475 U.S. 414, n.1. Because the suspect in *Moran* simply requested to remain silent rather than requesting counsel, the Court held that a reinterrogation of the suspect was proper.

In *Michigan* v. *Mosley, supra*, Justice White stated succinctly in his concurring opinion the reason why the Court distinguishes between a simple request to remain silent and a request to remain silent until one can speak with an attorney:

> [T]he reasons to keep the lines of communication between the authorities and the accused open when the accused has chosen to make his own decisions are not present when he indicates instead that he wishes legal advice with respect thereto. The authorities may then communicate with him through an attorney. *More to the point, the accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism.* (Emphasis added).

423 U.S. at 110, n.2.

The Arizona court recognized the distinction between a suspect's request for counsel and a mere request to remain silent. The Arizona Supreme Court, in *State* v. *Routhier*, 137 Ariz. 90, 669 P.2d 68 (1983), held that once an in-custody suspect had invoked his Fifth Amendment right to counsel, the police could not properly reinterrogate the suspect until he was provided with counsel. It did not expand *Edwards*. The fact that the renewed questioning pertained to a separate crime than the one for which he was initially arrested was found to be irrelevant. That fact lacked "any legal significance for Fifth Amendment purposes," the court held. *Id.* at 96-97, 669 P.2d at 76. The court in *Routhier* reached its decision by correctly and consistently applying well-settled principles of Fifth Amendment Constitutional Law, as explained in *Miranda* and *Edwards*.

In the present case, Mr. Roberson requested a lawyer immediately after being taken into custody. Instead of being allowed to speak with a lawyer, he was questioned four different times regarding Crime One (all in clear violation of *Edwards)*, spent *three days* in jail, still without having an opportunity to consult with a lawyer, and on the third day of his incarceration, a detective approached Mr. Roberson, not at Mr. Roberson's request, and questioned him a fifth time since the invocation of his right to counsel. The only distinction was that he questioned him regarding a separate crime. As in *Routhier, supra,* the fact that the renewed questioning pertained to Crime Two is irrelevant and lacks any legal significance for Fifth Amendment purposes.

A quote from the Arizona Supreme Court in *State* v. *Routhier, supra,* is particularly appropriate here to explain why the statements made by Mr. Roberson should be excluded from the State's case-in-chief:

> The assertion of the right to counsel is an expression by the accused that he is not competent to deal with the authorities without legal advice. See *Edwards* v. *Arizona, supra.* The resumption of questioning in the absence of an attorney after an accused has invoked his right to have counsel present during police interrogation strongly suggests to an accused that he has no choice but to answer. Thus, "a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism." (Quoting *Michigan* v. *Mosley,* 423 U.S. 96 (1975), White, J., concurring).

Id. at 97-98, 669 P.2d at 76-77.

There is compelling evidence that Mr. Roberson's statements where involuntary. The type of police misconduct which occurred in this case was exactly the type which this Court attempted to prevent in *Edwards* v. *Arizona.*

Mr. Roberson's perception of whether he should talk or not was not affected by whether he was talking about "Crime One" or "Crime Two." Rather, his sense of compulsion came from the oppressive custodial setting, the fact that he had requested a lawyer and was not provided with one, and the fact that he was questioned again and again by police officers after he had requested a lawyer. All of these factors combined strongly suggested to Mr. Roberson that he had no choice but to answer. Under these circumstances, there can be no finding that Mr. Roberson made the statements voluntarily and there can be no finding that Mr. Roberson made any valid waiver of his right to counsel. For, "[t]o permit the continuation of custodial interrogation after a momentary cessation would clearly frustrate the purposes of *Miranda* by allowing repeated rounds of questioning to undermine the will of the person being questioned." *Michigan* v. *Mosley,* 423 U.S. 96, 102 (1975).

The purposes of the Fifth Amendment, *Miranda,* and *Edwards* were clearly offended by the present case: A request for counsel was ignored, four rounds of custodial questioning took place, the Respondent was held in jail for three days without any contact with counsel and then questioned a fifth time. The trial court and the Court of Appeals properly held that Mr. Roberson's statements made during this fifth interrogation could not be used in the prosecution's case-in-chief. Likewise, this Court should so hold.

II. SINCE THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION HAS AS ITS FOCUS THE STATE OF MIND OF THE SUSPECT, WHETHER THE POLICE OFFICERS WHO INITIATED THE REINTERROGATION OF THE SUSPECT KNEW OR DID NOT KNOW OF THE SUSPECT'S PRIOR INVOCATION OF HIS FIFTH AMENDMENT RIGHT TO COUNSEL, AND WHETHER THE REINTERROGATION FOCUSED ON "CRIME ONE" OR "CRIME TWO" ARE IRRELEVANT IN DETERMINING WHETHER THE SUSPECT'S FIFTH AMENDMENT RIGHTS UNDER *MIRANDA* AND *EDWARDS* WERE VIOLATED.

With a proper understanding of the goals of the Fifth Amendment privilege against self-incrimination as set forth in *Miranda* v. *Arizona*, and *Edwards* v. *Arizona*, it becomes evident that in analyzing the privilege and the question of voluntariness of a waiver of the privilege, the courts should focus solely upon the mental state of the suspect and his sense of compulsion. This focus is to assure that any statements made by the suspect are voluntary. To that end, "the state of mind of the police is irrelevant to the question of the intelligence and voluntariness of respondent's election to abandon his rights." *Moran* v. *Burbine*, 475 U.S. 412, 106 S.Ct. 1135 (1986).

Similarly, once an in-custody suspect has invoked his right to counsel, the subject matter of a police-initiated reinterrogation is irrelevant in determining whether the suspect's rights were violated. When the suspect has requested counsel before answering any questions, the suspect becomes "off-limits" to the police and the police may not re-approach him for questioning on any subject until he has been provided counsel or until he himself initiates communication or conversation. This rule is clearly stated in *Edwards:*

> [A]lthough we have held that after initially being advised of his *Miranda* rights, the accused may himself validly waive his rights and respond to interrogation, . . . the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with police. (Citations and footnote omitted).

451 U.S. at 484-85.

Mr. Roberson was arrested in Crime One, requested counsel before answering *any* questions, was asked questions about Crime One four times, and then was questioned a fifth time about Crime Two. When he was asked about Crime Two, an officer who previously questioned him regarding Crime One was present and did part of the questioning. Nothing in these facts indicate Mr. Roberson acted voluntarily. The State confuses the simple issue presented in this case by wrongly relying on various prior cases which distinguish between investigations.

The Petitioner's reliance on the "separateness" of the investigation which lead to the subject confession is misplaced. The Petitioner uses a passage from *Westover* v. *U.S.*, a companion case of *Miranda*, in support of its case. It does so by ignoring the clear facts before this Court. *Westover* states:

> A different case would be presented if an accused were taken into custody by the second authority, removed both in time and place from his original surroundings and then adequately advised of his rights and given an opportunity to exercise them.

The Court goes on to say:

> But here the FBI interrogation was conducted immediately following the State interrogation in the same police station - in the same compelling surroundings. Thus, in obtaining a confession from Westover, the Federal authorities were *the beneficiaries of the pressure applied by the local in-custody interrogation*. In these circumstances, the giving of warnings alone was not sufficient to protect the privileged. (Emphasis added).

384 U.S. at 496-97.

The State actually argues that the fact that Mr. Roberson was removed in time and place from his original surroundings are facts in favor of the State's argument. This is ridiculous. He was removed from the scene of the arrest, taken and booked into custody in a jail and never given an attorney. As set forth in Petitioner's Statement of Facts, he was questioned five different times after originally asking to speak only through an attorney. He was clearly not given an opportunity to exercise his right to remain silent and to speak only through counsel.

The Petitioner argues that the facts in the present case are almost identical to those in the hypothetical set forth above in *Westover*. However, the facts of the Roberson case are much more like the actual facts of *Westover*. Roberson was in the "same compelling surroundings" at the time of his confession, namely, under arrest and in custody of the State. Also, the detectives in this case, in obtaining a confession from Roberson, "were the beneficiaries of the pressure applied by the in-custody interrogation" of others.

Next, the State argues that *Michigan* v. *Mosley*, 423 U.S. 96 (1975), should control the outcome of the present case. The State fails to recognize clear distinctions between this case and the facts of *Michigan* v. *Mosley*. The most obvious distinction is that the defendant in *Mosley* merely requested to remain silent, rather than requesting counsel. *Michigan* v. *Mosley* itself, as set forth in direct quotes above, distinguishes between the need to keep lines of communication open when an accused has chosen only to be silent, and the lack of such need when the accused has decided to deal with the authorities only with legal advice. Since Mr. Roberson decided to deal with the authorities only through an attorney, *Mosley* does not control this case and subsequent statements made without removal of the coercive atmosphere and without honoring his request for counsel must be considered involuntary.

Next, the State misapplies *Oregon* v. *Elstad* to the case at hand. *Oregon* v. *Elstad's* key holding is:

> It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warning unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free-will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period.

The difference between *Elstad* and the present case is as follows: Elstad's first confession was without Miranda warnings, thus his subsequent waiver of his rights was not prefaced by a prior request for counsel. Roberson requested counsel first and thus, the reinterrogation indicated to him that he did not have the choice of consulting

an attorney, *since he had requested one and his request was ignored.*

The error of the State's argument is further documented by this statement found on page 28 of its brief:

> The circumstances here (passage of time, change of place, change of interrogators) include all the factors which would serve to dissipate the coercive effect of even an involuntary initial statement, as well as the proper administration of Miranda warnings by Det. Cota-Robles which by itself would cure an uncoerced and voluntary initial statement.

To the contrary, the passage of time and the repeated interrogations by various officers only aggravated the coercive effect. While Mr. Roberson was waiting for the lawyer he had requested in order to talk to the police, he continued in custody without counsel and the repeated questioning by police did not dissipate the coercive nature of the situation but clearly added to it. The actions of the police, and the fact Mr. Roberson was kept in custody without an attorney implied to him a clear message: Our statement about your right go an attorney is a lie. That being the message, the confession was involuntary.

Petitioner argues that *Connecticut* v. *Barrett*, ___ U.S. ___, 107 S.Ct. 828 (1987), mitigates in its favor. The defendant in *Barrett* clearly indicated the desire to talk voluntarily without counsel. The restriction he invoked was that he would not put anything in writing without counsel and the State complied with that restriction. The Supreme Court held that there was no reason to interpret his request for an attorney more broadly than the clear limiting language of the request indicated. The court stated:

> To conclude that respondent invoked his right to counsel for all purposes requires not a broad interpretation of an ambiguous statement, but a disregard of the ordinary meaning of respondent's statement.

107 S.Ct. at 832.

In the present case, Petitioner argues that Mr. Roberson invoked his Fifth Amendment rights for the limited purpose of discussing "Crime One" and not for "Crime Two." However, a reading of the record indicates quite the contrary. When the police arrested Mr. Roberson and advised him of his *Miranda* rights, "subject replied that he understood his rights, and that he wanted a lawyer before answering *any* questions." (R.T. of April 3, 1986 at p. 26). (Emphasis added). An interpretation of this request according to its ordinary meaning indicated that Mr. Roberson fully invoked his right to counsel for all purposes and all subjects of interrogation.

Indeed, this Court has required that "a broad, rather than a narrow, interpretation to a defendant's request for counsel" be given, *Michigan* v. *Jackson*, ___ U.S. ___, 106 S.Ct. 1404, 1409 (1986). The Seventh Circuit, in interpreting *Connecticut* v. *Barrett*, stated ". . . a court must presume that an individual has invoked the full extent of his or her constitutional right to counsel." *United States ex rel. Espinoza* v. *Fairman*, 813 F.2d 117, 123 (7th Cir. 1987).

In addition to *Mosley, Elstad* and *Barrett*, Petitioner cites some Sixth Amendment cases: *Michigan* v. *Jackson*, 475 U.S. 625, 106 S.Ct. 1404 (1986); *Maine* v. *Moulton*, 474 U.S. 159, 106 S.Ct. 477 (1985); and, *Moran* v. *Burbine*, 475 U.S. 412, 106 S.Ct. 1135 (1986). The Fifth Amendment and the Sixth Amendment encompasses two very distinct rights. It is true that Fifth Amendment analysis has been, and continues to be, applied to Sixth Amendment cases, but no case suggests that Fifth Amendment rights should be restricted because of Sixth Amendment analysis. This is a Fifth Amendment case

and it should not be restricted by a Sixth Amendment analysis.

Petitioner further confuses the issues by attempting to apply the independent source doctrine to this case. The Petitioner argues that the State is placed in a worse position that it would have been had it not violated Mr. Roberson's rights. This presumes Mr. Roberson would have acted differently if his first *Miranda* warning occurred after he was placed in jail. There is no evidence to support this. Mr. Roberson, we must presume, would have requested counsel then. It is only after his request went unheeded that he spoke, giving up a right that to Mr. Roberson seemed worthless by then. Had Mr. Roberson been supplied with an attorney before any further interrogation, he and his attorney would have decided to proceed with his defense and in all likelihood he would not have made subsequent admissions. The source of Mr. Roberson's statements was not independent but rather caused by continual police custodial interrogation after assuring Mr. Roberson he had the right to counsel.

III. THIS COURT SHOULD RETAIN *EDWARDS* V. *ARIZONA* AND ITS *PER SE* RULE AGAINST POLICE-INITIATED REINTERROGATION OF AN IN-CUSTODY SUSPECT AFTER HE HAS INVOKED HIS FIFTH AMENDMENT RIGHT TO COUNSEL.

As noted above, this Court adopted the *Edwards per se* rule against police-initiated interrogation as a means of providing an in-custody suspect a full opportunity to exercise his privilege against self-incrimination. The Court recently explained that the purpose behind *Miranda* v. *Arizona* and *Edwards* v. *Arizona* is "preventing government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment." *Arizona* v. *Mauro*, ___

U.S. ___, 107 S.Ct. 1931, 1936-37 (1987). There is a supreme interest in ensuring that the Constitution is upheld, that due process is given to all persons subject to the court system and to ensure an effective adversary process. *Miranda* and *Edwards* have done well in ensuring the promotion of these interests. Taking away *Edwards* would be taking a major step backward in the fair, efficient and consistent application of criminal procedure laws grounded in the constitution. Furthermore, to not apply *Edwards* to the present case would be to strip the suspect's request for counsel of any meaning and to give little accord to his Fifth Amendment privilege against self-incrimination.

There is a great interest in preventing a recurring pattern of the police behavior which occurred in the present case. A suspect's invocation of his right to speak with counsel before answering questions would have no meaning whatsoever if the police were allowed to repeatedly question the suspect before honoring his request for counsel. Repeated custodial interrogations after a request for counsel gives the suspect the impression that his request has no practical meaning and that he has no choice but to answer, regardless of the subject reinterrogation or the mental state of the interrogator.

The *Edwards per se* rule is easy to understand and likewise easy to apply. It is no imposition on the police to refrain from questioning the suspect until he has been provided with counsel, once he makes the request. It is totally unacceptable for the police to hold a suspect for three days and to engage in reinterrogation before honoring his request. Such a situation easily can be interpreted as a deliberate attempt to break a suspects' will and a means of extracting a confession that otherwise would not be given.

In short, there was a powerful reason to adopt the *per se* rule in *Edwards* and there continues to be a powerful reason to retain that *per se* rule.

IV. RESPONSE TO SOLICITOR GENERAL'S ARGUMENT.

If one carefully examines the facts of this case, most of the argument of the Solicitor General does not even apply. He presumes a simple case where a defendant is arrested on State Charge One, and then is later interviewed in jail by a different agency with no contact whatsoever with the earlier agency in Federal Charge Two. This case is not so simple. In the present case, Mr. Roberson was questioned four times on Crime One and then questioned on Crime Two. The questioning in Crime Two involved one new officer not present previously and another officer who had previously violated Mr. Roberson's right in questioning him on Crime One. Thus, whether or not the Court decides to continue the bright line rule of *Edwards* from a policy point of view, the present case clearly involved badgering by the police and clearly involved facts such that the trial court's finding that the confession was involuntary should be upheld.

The Solicitor General's brief, like the State's brief, makes the error of focusing primarily on the actions of the police rather than on the state of mind of Mr. Roberson. In general, when a defendant is being investigated, he is not informed of the subject of the investigation or whether the investigation is in any way related to prior questioning. The main fact that he is aware of is that he is in jail and persons are asking him questions about crimes. A defendant is not aware, nor should he be required to be aware, of the intent of the investigator.

By eliminating the bright line rule of *Edwards* as the Solicitor General suggests, the courts would then have to inquire into the content of the conversations between the defendant and all of the investigators. The Court would have to inquire whether officers knew of prior invocations by the suspect, and officer credibility would be questioned. There is also great potential for abuse. The law, as requested by the Solicitor General, would put a premium on ignorance. Indeed, if the approach argued for by the Solicitor General is taken, it is imaginable that law enforcement agencies would adopt a policy of not inquiring into whether a defendant has requested counsel before approaching that defendant for questioning in a situation where he is in custody on another charge. To take the argument to its most absurd result, a person who is wanted on various multi-state and multi-agency crimes could be questioned ten times in a single setting, so long as the questions were regarding separate investigations by separate officers. In effect, all the abuses which were prevented by *Edwards* would be allowed so long as defendant happened to be the subject of several different investigations.

The Solicitor General argues that "while law enforcement officials involved in a single investigation can reasonably be required to be aware that the suspect has requested counsel and to treat him accordingly, it is far more burdensome to require every investigator to determine whether any suspect he questions in custody has previously requested counsel in connection with any unrelated investigation." This statement lacks common sense. Any investigator would have to determine that the suspect was in jail and being held on a certain charge. It would be very easy to review the arrest information to determine whether or not the suspect has requested

counsel. Indeed, if there were ever a time that it would be difficult to determine whether a suspect had requested counsel, it would be during the booking process of a single incident arrest. This case is on point. Mr. Roberson was questioned by several officers after he had requested counsel in response to the *Miranda* warnings of the first officer who spoke to him. All four of the officers who clearly violated Mr. Roberson's Fifth Amendment rights were involved in the first investigation and ignorant of his invocation. This is a burden law enforcement officials have been required to live with for some time, and it has not caused any major problems. To require the same of investigators from different agencies at a time when the defendant has already been booked into custody would not be an additional burden.

The Solicitor General also argues about the extreme value of the interrogation process. This Court is referred to the language cited earlier in this brief about the history of the Fifth Amendment. Important to that history is the policy that interrogation is not to be relied on as the primary tool of law enforcement agencies.

The Solicitor General argues that the defendant may have a different motivation in the second investigation to speak. Again, this argument presumes that the suspect will have been clearly informed of the two different investigations that are occurring. This was clearly not the case nor would it be generally. As soon as a suspect is arrested and charged with a crime, requests to remain silent and requests counsel, he will not gain any more information on any investigation except through counsel. In the event the defendant needs information, his attorney provides it. The Solicitor General requests that this Court distinguish between separate interrogation relating to separate crimes and a truly "independent investigation." The Solicitor General does not give this Court any suggestion as to how to define "independent investigation." Any definition would have to focus on the mind of the defendant, and that being so, no definition would work. Especially applied to this case where an investigator from Crime One was present during the questioning on Crime Two, there clearly could be no finding that these cases were totally independent of each other.

Finally, while the Solicitor General and the various other briefs filed in this matter all argue that there would be less chance of an involuntary waiver when the interrogations were related to separate investigations and/or separate crimes, no brief explains why. The Solicitor General's argument should not be accepted by this Court as it would trade a bright line rule for a very complicated analysis of whether an investigation was adequately independent. It would switch focus from the state of mind of the defendant to the actions of agencies in determining whether somebody made a confession voluntarily. This would be inappropriate since the Fifth Amendment has as its main purpose an individual's right to remain silent.

Even if the Solicitor General's arguments are agreed to in the abstract, that clearly cannot apply to this case where there were not independent investigations. There were so many different violations of Mr. Roberson's rights that there was unquestionable badgering by the police, and Mr. Roberson, because of all the facts of the case, did not make a voluntary confession.

CONCLUSION

This case is a simple one to decide when the confused analysis of the Petitioner is set aside. *Miranda* and *Edwards* hold that a defendant's right to silence under the Fifth Amendment also entails the right to have an

attorney present before speaking while in custodial interrogation. The bright line rules of *Miranda* and *Edwards* require a finding that where a defendant remains in custody after requesting counsel, any subsequent interrogation would be unduly coercive and, therefore, statements made in subsequent interrogations must be suppressed. The subject matter of those interrogations and the mental state of the police is irrelevant under Fifth Amendment analysis since it is the voluntariness of the statements that is the issue. In the present case, Mr. Roberson clearly decided to speak to counsel before making statements to the officers and indicated as much to the police. He was then confined for several days and reinterrogated without speaking to a lawyer. The statements made during the subsequent interrogation were properly suppressed.

The trial court and the Court of Appeals correctly held that the statements should be excluded from the State's case-in-chief. This Court should affirm the lower courts' decisions.

Respectfully submitted,

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No. 87-354

In The
Supreme Court of the United States
October Term, 1987

THE STATE OF ARIZONA,
Petitioner,

vs

RONALD WILLIAM ROBERSON,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

PETITIONER'S REPLY BRIEF ON THE MERITS

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RESPONDENT'S BRIEF, IN EMPHASIZING THE SUPPOSED INVOLUNTARINESS OF ROBERSON'S STATEMENT TO DETECTIVE COTA-ROBLES, BOTH OVERLOOKS THE FACTS (WHICH DEMONSTRATE ROBERSON'S STATEMENT TO HAVE BEEN VOLUNTARY), AND EFFECTIVELY CONCEDES THE NEED TO CHANGE THE PER SE EDWARDS RULE, WHICH CURRENTLY MAKES VOLUNTARINESS IRRELEVANT.

The issue before this Court is whether the *per se* rule of *Edwards v. Arizona*, 451 U.S. 477 (1981), is properly applicable to a case where a suspect is ultimately questioned about a crime wholly separate from the one in view when he was given his rights warnings and asked for a lawyer. Necessarily implied by that question is the threshold question whether the *per se* rule of *Edwards* should be applied in *any case*, a matter addressed by both parties. (*See* Petitioner's Brief at 35-41; Respondent's Brief at 18-20.) However, the major theme of Respondent's Brief seems to be an effort to convince this Court that Roberson's April 19, 1985 statement to Detective Cota-Robles was not voluntarily given.[1]

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1 Respondent's Brief flatly calls the statement involuntary at least six times. (See pages 10-11, 13, 15, 16, 20, 23.) It repeatedly argues, despite this Court's recent decision in *Colorado v. Connelly*, — U.S. —, 107 S.Ct. 515 (1987), that the analytical focus should be on the suspect's state of mind. (See pages 12, 20, 23.) It refers almost a dozen times to the repeated questioning of Roberson. (Pages 1, 10, 11, 13, 14, 16, 18, 19, 20.) It repeatedly emphasizes the length of time Roberson was in custody without counsel before he was questioned by Detective Cota-Robles. (Pages 1-2, 10, 11, 14, 16, 19, 24.) It even characterizes the trial court's action as being a "finding that the confession was involuntary." (Page 20.)

Respondent's zeal to demonstrate involuntariness does a disservice to this Court in at least two ways. First, it tends to create a distorted view of the facts of this case. For example, one may read Respondent's Brief in its entirety without ever finding mention of the fact that the trial court concluded that Roberson's statement *was* voluntary, and therefore was admissible as impeachment if Roberson testified at trial. (R.T. of April 3, 1986, at 43-36; *see also* Petitioner's Brief at 6.) That conclusion was not challenged in the Arizona Court of Appeals during the State's appeal of the suppression order, which was strictly limited to the *Edwards* issue. (*See* the various briefs included with the record certified to this Court.) Therefore, that Roberson's statement was indeed voluntary simply is not open to question in this Court, and Respondent's characterization of the trial court's ruling is manifestly wrong.

Another example: Respondent's Brief at 1, 10, 13, and 20 asserts that all of the questioning after Roberson's arrest, except Detective Cota-Robles' interview on April 19, 1985, related to "Crime One", the April 16 burglary during which Roberson was apprehended. This tends to create an impression of badgering, that culminated in the statement given to Cota-Robles. However, there actually is nothing in the record from which it can be positively determined what the subject matter of each interview was, but there are strong indications that several of the interviews concerned information about others' drug offenses and robberies, which Roberson was offering to mitigate the heavy sentence he expected to receive on his burglary, and were *not* repeated interrogations about "Crime One", in which he had been caught "red-handed". (*See* R.T. of

Oct. 17, 1985, at 12, 18, 27-28; R.T. of April 3, 1986, at 29-30.) Thus, Respondent's Brief has gone to great lengths to create an aura of involuntariness when the facts indicate, and the trial court found, that Roberson's statement to Detective Cota-Robles was wholly voluntary.

This baseless emphasis on supposed involuntariness is particularly inappropriate in this case, because the essence of Respondent's position is that the *Edwards* rule should be maintained in all its *per se* rigidity. Voluntariness-in-fact is completely irrelevant if the *per se* rule of *Edwards* remains viable; the point of that case was the establishment of an absolute rule against police-initiated renewal of interrogation, so that it simply doesn't matter whether Robert Edwards or Ron Roberson or any other suspect is speaking voluntarily, if they don't get in the first word. Thus, much of Respondent's Brief appears to be a purely emotional appeal, of negligible assistance to the Court in resolving the issue before it. However, the inability of Respondent's Brief to escape voluntariness analysis, even in the midst of advocacy of the *Edwards per se* rule, dramatically demonstrates an intuitive recognition of where the fundamental values of our constitutional criminal law system truly reside. Even the attorney with the greatest imaginable stake in the maintenance of the *Edwards per se* rule has implicitly acknowledged that it is resolution of the issue of voluntariness-in-fact which permits us to say whether someone was *compelled* to incriminate himself (contrary to the Fifth Amendment), or whether it is fundamentally *fair* (as required by the Due Process Clause of the Fourteenth Amendment) for the person's statement to be admitted into evidence against

him. Thus, Respondent's own advocacy supports revision of the *per se* rule of *Edwards*.

This Court has previously been presented with a variety of reasons why the *Edwards* rule is ripe for reevaluation. (*See* Petitioner's Brief at 35-41.) Respondent's Brief unwittingly but forcefully supports the proposition that the *Edwards per se* rule should be abandoned, by showing that the rule is not really responsive to the question it was supposed to answer—whether it is *just* in the constitutional sense to admit the defendant's statements against him. That only a voluntariness inquiry can accomplish. If the recognized social costs inflicted by utilization of an exclusionary rule are not substantially outweighed by the benefits to be derived from the use of such a rule, its implementation cannot be justified. Seven years experience with the *Edwards* rule shows that its benefits are unacceptably costly, so it should now be abandoned in favor of the traditional rights waiver test of *Johnson v. Zerbst*, 304 U.S. 458 (1938).

II.

TO THE EXTENT THAT THE SIXTH AMENDMENT IS A SOURCE FOR THE PER SE RULE OF EDWARDS V. ARIZONA, PROPER ANALYSIS REQUIRES THE CONCLUSION THAT THE STATEMENTS OBTAINED IN THIS CASE SHOULD HAVE BEEN ADMITTED.

When Respondent does deal with the nature and effects of *Edwards* as a *per se* rule, rather than attempting to create an emotionally-charged vision of relentless police "badgering", he finds himself on the horns of a dilemma. The decision in *Miranda v. Arizona*, 384 U.S. 436 (1966),

spoke of two situations in which interrogation of a suspect should cease: when he invokes his right to silence and when he asks for a lawyer. This Court concluded in *Michigan v. Mosley*, 423 U.S. 96 (1975), that invoking the right to silence was not an absolute bar to further police questioning, so long as the suspect's right was "scrupulously observed". It would seem logical that invocation of the "right to counsel", which in the context of interrogation acts in precisely the same way as invocation of the right to silence, should have been treated in the same way—a voluntary waiver would be acceptable at some point in time if the right was "scrupulously observed".

Instead, this Court created the *per se* rule of *Edwards*, forbidding any police-initiated renewal of questioning. This differing treatment was apparently based on a perception that the "right to counsel" was of such value, even in interrogation situations, that it needed to be more jealously protected. It is far from clear that, at least in the context of pre-arraignment interrogation, such a distinction can properly be drawn. An account of an address given in 1983 by Yale Kamisar, one of the staunchest supporters of *Miranda* and its progeny, indicates that even he cannot rationalize the distinction.

> Preliminarily, Kamisar discussed Miranda's progeny in general, focusing on the Court's differentiation between invocation of the right to remain silent in Michigan v. Mosley, 423 U.S. 3017 [sic] (1975), and invocation of the right to counsel. He termed it "baffling" that the Court has given the police greater leeway to resume interrogation when the right to remain silent has been asserted. Miranda's language cuts the other way, he suggested; furthermore, logic would seem to call for greater protection of the right to re-

> main silent since that is the basic right that Miranda meant to safeguard. The right to counsel is merely a derivative right in these circumstances.

(34 Crim.L.Rep. at 2101.) However, if *extra* protection is to be accorded to an invocation of the "right to counsel", which on its face appears to be a mere adjunct and offshoot of the Fifth Amendment right to silence, whence comes this additional value which requires special safeguards? The only possible source would seem to be another amendment, presumably the Sixth, which in other contexts generates the right to the assistance of counsel.

And therein lies the rub for Respondent. Sixth Amendment rights must also have Sixth Amendment limits, unless a logically indefensible attitude of "Heads, I win; tails, you lose" is adopted, applying to a criminal defendant the benefits but not the strictures of Sixth Amendment analysis. As pointed out in Petitioner's Brief at 31-33, this Court's decisions in *Maine v. Moulton,* 474 U.S. 159 (1985), and *Moran v. Burbine,* 475 U.S. 412 (1986), plainly indicate that the Sixth Amendment requires a knowing circumvention of an accused's rights for there to be a violation, and will not permit an error committed in one case to be the basis for suppressing evidence in an unrelated case which contained no error. Such an analysis would certainly require admission of Roberson's statement to Detective Cota-Robles, because *Miranda* was followed to the letter and the statement was voluntary, so there was no basis for exclusion in that case, taken by itself.

Respondent wants the *Edwards* rule to remain rigid, when the only basis for distinguishing the multi-factor

Mosley approach from the *per se Edwards* approach is that the *Edwards*-protected right apparently is at least partially derived from the Sixth Amendment rather than solely from the Fifth Amendment—and Sixth Amendment analysis entails admission of Roberson's statement. Respondent's Brief cannot resolve this tension; it merely mumbles for one paragraph (pages 17-18) and hurries on. This Court's intellectual integrity will not permit it to skirt the issue in this way. If the Sixth Amendment is indeed one of the sources for *Edwards,* then *Maine v. Moulton* and *Moran v. Burbine* require the statement in this case to be found admissible. If the Sixth Amendment is *not* a source for *Edwards,* and the *Miranda*-generated "right to counsel" is merely an adjunct to the Fifth Amendment right to silence, then logically the *per se Edwards* rule must be abrogated and a consistent *Mosley*-like approach be adopted whenever a *Miranda* right waiver is at issue.

———o———

CONCLUSION

Respondent's Brief discloses no substantial defects in the reasoning of Petitioner's Brief. Therefore, this Court should award one of the alternate forms of relief requested by Petitioner—either restrict *Edwards* to one-investigation cases or (preferably) abrogate altogether the *per se* rule of *Edwards*, substituting an approach like that utilized in *Michigan v. Mosley* and *Johnson v. Zerbst*, 304 U.S. 458 (1938).

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No. 87-354

IN THE

Supreme Court of the United States

October Term, 1986

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vs.

RONALD WILLIAM ROBERSON,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

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INTEREST OF THE AMICI

The State of Indiana, and the twelve other amici states and commonwealths, through their respective Attorneys General, offer this brief as amici curiae in support of the position argued

by Petitioner, the State of Arizona, through its Attorney General, in the above-captioned matter. The amici states and commonwealths, in the effort to promote the safety and welfare of their citizens, all enforce the criminal laws of their respective states and commonwealths. The investigation of violations of those criminal laws are a vital function of the governments of the amici states and commonwealths. The investigation of crimes committed within the jurisdiction of a state or commonwealth will invariably include the questioning of suspects, including those persons arrested or held in custody.

The questioning of suspects in custody is circumscribed by federal constitutional provisions, as well as by state constitutional provisions and rules. The interest of the amici states and commonwealths in the present case is the extension of federal constitutional provisions to the states in the questioning of an in-custody suspect who has invoked his Fifth Amendment right not to talk with police until he has an attorney, in the case for which he is in custody, to questioning by law enforcement officers concerning an unrelated case. There is a disparity among the states and commonwealths in this country as to whether the rule fashioned in the United States Supreme Court case of *Edwards v. Arizona* is applicable to a situation such as is presented in the case at bar. It is the position of the amici states and commonwealths who have joined in this brief that the rule pronounced in *Edwards v. Arizona*, concerning the questioning of an in-custody suspect after he has invoked his right to counsel, is inapplicable to questioning of an in-custody suspect on an unrelated criminal case. Because of their criminal law enforcement duties, the amici states and commonwealths have a vital interest in the resolution of the present cause for an important investigative tool of law enforcement officers may be further eroded should the rule in *Edwards v. Arizona* be extended to encompass unrelated crimes, as has been held by the Arizona Supreme Court in the present case.

STATEMENT OF THE CASE

On April 16, 1985, Ronald William Roberson (hereinafter Respondent) was arrested for a burglary which formed the basis for the charge in case CR-15268. Respondent was advised of his rights by Officer Perez and Respondent requested an attorney. Officer Perez did not then question Respondent. However, a few minutes later Officer Garrison, who did not know that Respondent had requested an attorney, approached Respondent. Respondent did give a statement to Officer Garrison. This statement, however, was suppressed at trial in cause CR-15268.

The present case involves a burglary charge in cause CR-16041. The investigation of this burglary, which occurred on April 15, 1985, was handled by Detective Jerry Cota-Robles. On April 18, 1985, Detective Cota-Robles called another department of the Tucson Police Department concerning a suspect vehicle in his case and learned that a subject had recently been arrested in that car for another burglary (the CR-15268 case). On April 19, 1985, Detective Cota-Robles went with the investigating detectives from the other burglary to question Respondent about the burglary he was investigating. Detective Cota-Robles had no knowledge of any prior questioning of Respondent.

At the jail, Detective Cota-Robles informed Respondent of his rights twice, once before he turned on the tape recorder and once after the tape recorder was turned on. Respondent indicated his understanding of his rights and gave a full confession of the April 15 burglary. Respondent never requested an attorney.

At the trial on the April 15, 1985 burglary, cause CR-16041, the April 19 statement was suppressed by the trial court. Moreover, the trial court found as a matter of fact that there was no connection between the April 16 violation and the April 19 questioning. The trial court felt compelled to suppress the April 19 statement due to the holding of the Arizona Supreme Court in *State v. Routhier*. The Arizona Court of Appeals

agreed with the trial court and the Arizona Supreme Court denied review of the case.

SUMMARY OF THE ARGUMENT

The rule in *Edwards v. Arizona* should not be extended to include questioning on unrelated crimes. So long as the police questioning of the suspect on the unrelated crime is legitimate, the suspect is advised of his rights, and coercive activity is not used in the questioning, any statement concerning the unrelated crime should be admissible at the trial of that unrelated crime. Extension of the *Edwards v. Arizona* rule to questioning on unrelated crimes would severely cripple the public interest in investigating criminal activity without serving a rational constitutional objective.

ARGUMENT

THE RULE OF *EDWARDS V. ARIZONA* THAT POLICE OFFICERS MAY NOT INITIATE INTERROGATION OF AN IN-CUSTODY SUSPECT IS INAPPLICABLE TO A CASE WHERE THE SUSPECT, HAVING INVOKED HIS RIGHTS IN REGARD TO A CRIME THEN UNDER INVESTIGATION, LATER CONSENTS TO QUESTIONING ABOUT AN UNRELATED CRIME BY OTHER OFFICERS WHO HAVE FULLY ADVISED THE SUSPECT OF HIS RIGHTS

It is, of course, well settled that before an in-custody suspect may be questioned by law enforcement officers he must first be advised of his rights, including his right against self-incrimination and his right to counsel. *Miranda v. Arizona*, 384 U.S. 436 (1966). Furthermore, when a suspect invokes his rights under *Miranda* and requests an attorney it has been held that the suspect is not subject to further police interrogation until counsel has been made available to him, unless the suspect himself initiates further communication or conversations with the police. *Edwards v. Arizona*, 451 U.S. 477 (1981). Both

Miranda and *Edwards* were "prophylactic rules designed to insulate the exercise of Fifth Amendment rights from the governments 'compulsion, subtle or otherwise,' that 'operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked.'" (citations omitted). *Connecticut v. Barrett*, ____ U.S. ____, 107 S.Ct. 828, at 832 (1987). However, it has also been observed by the Court that caution should be used in further expanding currently applicable exclusionary rules and in erecting further barriers to presenting truthful and probative evidence to state court juries. *Colorado v. Connelly*, ____ U.S. ____, 107 S.Ct. 515, 521-522 (1986).

In *State v. Routhier*, 137 Ariz. 90, 669 P.2d 68, U.S. *cert. den.* 464 U.S. 1073 (1983), the Arizona Supreme Court held that the rule of *Edwards v. Arizona* was equally applicable to the situation where an accused is subsequently questioned by police on an unrelated case after having requested counsel on the case for which he is in custody. The amici states and commonwealths believe this to be an unwarranted expansion of the prophylactic rule of *Edwards v. Arizona* and a further barrier to providing state court juries with truthful and probative evidence.

The amici states and commonwealths recognize that the courts in some states have extended the rule of *Edwards v. Arizona* to include questioning on unrelated offenses. *See People v. Hammock*, 121 Ill. App. 3d 874, 460 N.E.2d 378, U.S. *cert. den.* 470 U.S. 1003 (1984); *Offutt v. State*, 56 Md. App. 147, 467 A.2d 194 (1983). Several jurisdictions, however, have refused to extend the *Edwards v. Arizona* rule to questioning by police on unrelated crimes, particularly when the officers doing the questioning on the unrelated crimes were ignorant of the previous assertion of the right to counsel. *See Lofton v. State*, Fla. App., 471 So.2d 665 (1985); *State v. Willie*, La., 410 So.2d 1019 (1982); *State v. Salgado*, La. App., 473 So.2d 84 (1985); *State v. Harriman*, La. App., 434 So.2d 551, U.S. *cert. den.* 106 S.Ct. 1958 (1983); *State v. Porter*, 210 N.J. Super. 383, 510 A.2d 49 (1986); *State v. Dampier*, 314 N.C. 292, 333 S.E.2d 230 (1985); *State v. Sparklin*, 296 Or. 85, 672 P.2d 1182 (1983);

State v. Newton, Utah, 682 P.2d 295 (1984); *McFadden v. Commonwealth*, 225 Va. 103, 300 S.E.2d 924 (1983); *State v. Cornethan*, 38 Wash. App. 231, 684 P.2d 1355 (1984).

As was previously observed, the purpose of *Miranda* and *Edwards* was to prevent police coercion so that only voluntary statements would be given by in-custody suspects. *See Connecticut v. Barrett*, *supra*, 832. Indeed, as has been stated by the Court: "The sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion." *Colorado v. Connelly*, *supra*, at 523. Thus, absent police coercion there is nothing on which to predicate a constitutional violation. *See Colorado v. Connelly*, *supra*, 522. Since exclusionary rules are designed to deter lawless conduct by the police, *Id.*, 523, where a statement has been obtained without police coercion there is no rational reason for excluding that statement from evidence at trial.

In the present case, Respondent was fully advised of his *Miranda* rights before he gave his statement. There is no evidence of police coercion. The only reason Respondent's statement has been excluded from evidence is because he had asked for counsel on another unrelated crime three days earlier. There was no coercive police activity. What lawless conduct by the police, therefore, is to be deterred by exclusion of Respondent's statement? Had the police made up other crimes, or used other crimes for which Respondent was not seriously a suspect, as a means to circumvent the request for counsel on the original charge, then, the police activity would have smacked of coercion. However, such are not the facts of the present case. Detective Cota-Robles was legitimately investigating a case wholly unrelated to the charge on which Respondent had invoked his right to counsel. Moreover, he fully advised Respondent of his rights. Further, he was unaware Respondent had requested counsel on the other case. Again, what coercive police activity is to be deterred in such a situation? *See State v. Harrison*, *supra*, 558.

Law enforcement agencies are charged with the duty of ferreting out criminals. Questioning of suspects is an indispensible tool in this endeavor. Extending the rule in *Edwards v. Arizona* to forbid legitimate non-coercive questioning on unrelated crimes would unduly frustrate the public's interest in the investigation of criminal activities. The Court has recognized this fact in the context of the Sixth Amendment. The Court has observed that the legitimate public interest in the investigation of crimes would be unnecessarily frustrated if courts were "to exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time. . . ." *Maine v. Moulton*, 474 U.S. 159, 106 S.Ct. 477, at 489 (1985).

The distinction between invocation of the Fifth Amendment right as opposed to the Sixth Amendment right to counsel in interrogation cases has been severely diminished recently. *See Michigan v. Jackson*, ____ U.S. ____, 106 S.Ct. 1404 (1986). Therefore, it is not improper to consider the Sixth Amendment cases in the context of the *Edwards v. Arizona* rule.

The observation by the Court in *Maine v. Moulton*, *supra*, at 490, fn. 16, that: "Incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, or course, admissible at a trial of those offenses", perhaps, foreshadows what the Court's decision should be in the case at bar. Just as invoking the Sixth Amendment right to counsel on one charge does not invoke that right for other charges. *Id.*, merely because a suspect has invoked his *Miranda* right to counsel on one offense should not be deemed to prevent police from subsequently initiating legitimate non-coercive questioning on another wholly unrelated offense, so long as the suspect is properly informed of his *Miranda* rights before such questioning begins.

Extending the rule in *Edwards v. Arizona* to unrelated crimes would severely frustrate police investigation of other criminal activity without serving a rational constitutional objective. In fact, it would totally thwart legitimate police

investigation of the unrelated crime. When the police obtain a statement on the unrelated crime, without coercion and only after having advised the suspect of his rights, to then say that the statement is inadmissible is to punish the police for competent and proper police work.

The prophylactic rule in *Edwards v. Arizona*, as previously noted, was intended to prevent the police from securing confessions by ignoring the invocation of Fifth Amendment rights. *Edwards* itself shows that the rule was designed to prevent that type of police abuse of rights that occurs whenever the police persist in questioning a suspect on a crime after he has repeatedly invoked his rights. The rationale for this prophylactic rule, however, does not extend to the situation of questioning on an entirely different offense. Questioning on an unrelated matter does not demonstrate that the police are ignoring the suspect's rights or abusing the invocation of the suspect's rights on the original case. The public has a legitimate interest in finding the truth. Questioning a person about an offense, when it is unrelated to that for which he is in custody and on which he has invoked his rights, is a vital aid to the public interest in solving crimes and it does not infringe upon the rights invoked by the individual for the offense on which he was originally in custody.

Miranda and *Edwards* were designed to prevent law enforcement officers from using the coercive nature of confinement to extract confessions that would not be given under unrestrained conditions. *See Arizona v. Mauro*, ___ U.S. ___, 107 S.Ct. 1391, 1936-1937 (1987). The facts in the case at bar do not implicate that purpose. Respondent, clearly, was not subjected to coercive police activity. His statement to Detective Cota-Robles was voluntary. So long as the police are legitimately investigating other crimes, properly advise the suspect of his *Miranda* rights, and do not engage in coercive behavior, there is no legitimate rationale for holding that a request for counsel on one criminal investigation prevents subsequent questioning on other unrelated criminal investigations. This is especially true where the officer or officers investigating the other unrelated offense do not know of the previous request for counsel.

CONCLUSION

For the above reasons, it is respectfully submitted that the position of Petitioner, State of Arizona, is correct and that the opinion of the Arizona court in the case be reversed.

Respectfully submitted,

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No. 87-354

In the Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF ARIZONA, PETITIONER

v.

RONALD WILLIAM ROBERSON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the police may interrogate a suspect after he has requested counsel in the course of a separate investigation of an unrelated offense.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The issue in this case is whether respondent's waiver of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), was invalid because the police officers who questioned him initiated their interrogation after respondent had previously requested counsel in an unrelated investigation. This case requires the Court to consider whether the principles of *Edwards* v. *Arizona*, 451 U.S. 477 (1981), apply to interrogations conducted in the course of an investigation that is separate from the one in which the suspect has invoked his right to counsel.

The Court's resolution of this case is likely to affect the conduct of interrogations by federal law enforcement officers and the admission of voluntary statements by defendants in federal criminal prosecutions. The problem presented by this case can arise, for example, when federal agents investigate a person who is in state custody and is also the subject of a state criminal investigation. That person may invoke his right to counsel in response to questioning by state investigators, but subsequently agree to

talk to federal agents who are conducting a separate investigation of a different criminal episode. If the rule in *Edwards* were applied in such a case, the statements obtained by the federal investigators would be inadmissible at trial, even though those statements were obtained after the federal agents had advised the suspect of his rights under *Miranda* and the suspect had waived those rights. In our view, the policies underlying the Court's decisions in *Miranda* and *Edwards* do not require the exclusion of voluntary statements made by suspects in such circumstances.

STATEMENT

Respondent was arrested on April 16, 1985, in Tucson, Arizona, at the scene of a burglary. Officer Perez, the arresting officer, gave respondent the warnings required by *Miranda* v. *Arizona,* 384 U.S. 436 (1966). Respondent then stated that he wanted a lawyer before answering any questions (Pet. App. 12; 4/3/86 Tr. 23, 26).[1] Officer Perez did not attempt to question respondent.

Shortly thereafter, Officer Quinn arrived at the scene of the arrest. Officer Quinn had been told that respondent had agreed to give a statement (10/17/85 PM Tr. 8). Quinn confirmed that respondent had been advised of his constitutional rights, and Quinn was told by officers at the scene that respondent was willing to speak with them (*ibid.*). Officer Quinn then spoke briefly with respondent, asking if it was true that respondent was willing to give a statement. Respondent indicated that he was (*ibid.*).

[1] Citations to "4/3/86 Tr." refer to the transcript of the suppression hearing in this case. Citations to "10/17/85 PM Tr." refer to the transcript of the afternoon hearing on motions in respondent's earlier trial. That transcript was made a part of the record in this case (4/3/86 Tr. 59).

Before any interrogation, respondent was taken to the Eastside Police Station in Tucson. There, without objection from respondent, Officer Quinn recorded respondent's statement concerning the April 16 burglary and his drug connections (10/17/85 PM Tr. 9-12). Shortly thereafter, respondent gave another recorded statement to Officer Garrison. Like Officer Quinn, Officer Garrison was not told that respondent had made a request for counsel at the time Officer Perez first gave him the *Miranda* warnings (Pet. App. 20; 4/3/86 Tr. 23-24, 52).

Meanwhile, Detective Cota-Robles, operating out of the Downtown Tucson Police Station, was investigating a burglary that had occurred on April 15, the day before respondent's arrest. Detective Cota-Robles traced a car that had been seen at the site of that burglary to respondent, and he learned that respondent was already in custody at the Eastside Station. Accordingly, Cota-Robles visited respondent in jail on April 19, explained that he wished to discuss the April 15 burglary, and gave respondent complete *Miranda* warnings (4/3/86 Tr. 8-20). Respondent agreed to answer Detective Cota-Robles' questions and did not express any desire to consult an attorney. Cota-Robles then questioned respondent about the April 15 burglary and recorded the interview on a tape recorder (*id.* at 19-20). At some point thereafter, a review of Officer Perez's report of the arrest revealed that respondent had requested an attorney at the time of his arrest in connection with the April 16 burglary.

Respondent was tried first for the April 16 burglary and was convicted. His statements regarding that burglary were admitted at trial only for impeachment purposes (4/3/86 Tr. 27). Respondent was then prosecuted on the charges arising out of the April 15 burglary—the charges at issue in this case. After a hearing, the district court suppressed the statements respondent had made to Detective Cota-Robles concerning the April 15 burglary. The district

court concluded that suppression was required under the Arizona Supreme Court's decision in *State* v. *Routhier,* 137 Ariz. 90, 669 P.2d 68 (1983), cert. denied, 464 U.S. 1073 (1984), even though the Cota-Robles interview was "in no way a fruit of the April 16th violation" (4/3/86 Tr. 50-51).[2] The district court also noted that "nobody is questioning Detective Cota-Robles' motives or his methods. * * * [T]here's nothing wrong with what he had done except for the fact that [respondent] had invoked his right to counsel earlier" (*id.* at 50). Nonetheless, because respondent had asserted his right to counsel at the time of his arrest, the district court held that the fruits of any subsequent interrogation—even interrogation conducted during a separate investigation of a different crime—had to be suppressed.

The district court then granted the State's motion to dismiss the case without prejudice, in order to enable the State to take an appeal of the suppression motion (4/3/86 Tr. 60). The Arizona Court of Appeals affirmed on the basis of the *Routhier* decision (Pet. App. 21-24), and the Arizona Supreme Court denied the State's petition for review (*id.* at 25).[3]

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[2] The *Routhier* case interpreted this Court's decision in *Edwards* v. *Arizona,* 451 U.S. 477 (1981), to require that once a suspect requests counsel, all police-initiated interrogation must cease, including interrogation concerning unrelated offenses.

[3] The State has denominated its petition as one for certiorari to the Arizona Supreme Court. Because that court denied the State's petition for discretionary review, we believe that the petition should be directed to the Arizona Court of Appeals, Division Two. See *Faretta* v. *California,* 422 U.S. 806, 812 (1975). We believe the proper course at this juncture is for the Court to treat the papers in this case as a petition for a writ of certiorari to the Arizona Court of Appeals, Division Two, and to direct the judgment in this case to that court. See *Callender* v. *Florida,* 383 U.S. 270 (1966); R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 350-351 & n.61 (6th ed. 1986).

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Miranda* v. *Arizona,* 384 U.S. 436 (1966), this Court concluded that custodial interrogation by law enforcement officers generates "pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely" (*id.* at 467). To combat those pressures, the Court in *Miranda* devised a prophylactic rule that was designed to "assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process" (*id.* at 469). One of the requirements of the rule created in *Miranda* is that before questioning a suspect in custody, a law enforcement officer must inform him that he has the right to the presence of an attorney (*id.* at 444). If the suspect requests counsel, the *Miranda* Court held, "the interrogation must cease until an attorney is present" (*id.* at 474).

In *Edwards* v. *Arizona,* 451 U.S. 477 (1981), the Court created a new rule to deal with cases in which a request for counsel is made after *Miranda* warnings have been given. The Court in *Edwards* held that when a request for counsel has been made, the suspect "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police" (*id.* at 484-485). *Edwards* established a bright-line, prophylactic rule that, like *Miranda* itself, "provides a remedy even to the defendant who has suffered no identifiable constitutional harm." *Oregon* v. *Elstad,* 470 U.S. 298, 307 (1985). The justification given for the new rule was the concern that "[i]n the absence of such a bright-line prohibition, the authorities through 'badger[ing]' or 'overreaching'—explicit or subtle, deliberate or unintentional—might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." *Smith* v. *Illinois,*

469 U.S. 91, 98 (1984). In light of that concern, the Court has adopted a per se rule barring police interrogation after a request for counsel; the Court has refused to examine the circumstances of each case to determine whether the police-initiated questioning following a request for counsel led to a voluntary waiver of the suspect's rights.

We submit that there is a class of cases—of which the instant one is an example—in which the competing concerns of protecting suspects from police coercion and minimizing interference with legitimate investigative activities require the striking of a different balance from the one struck in *Edwards*. The results of police-initiated interrogation of a suspect who has previously requested counsel should not be suppressed when the new interrogation occurs in the course of an investigation that is independent of the one in which the request for counsel was made. In that setting, where full *Miranda* warnings are given before the new interrogation begins, and where the suspect does not request counsel in connection with the interrogation, the risk of police "badgering" is insubstantial, and the burden on the suspect is minimal. Moreover, unlike the case in which the suspect has decided that he wants to deal with the police through counsel with respect to a particular investigation, there are good reasons that may cause a suspect to decide not to invoke counsel in connection with a different and unrelated investigation. A blanket assumption that a different conclusion on the suspect's part is likely to be the product of police coercion is not justified when separate investigations are involved.

The considerations on the other side of the balance also cut against extending *Edwards* to cases such as this one. Applying the *Edwards* rule to interrogations arising from separate investigations would impose a significantly greater burden on law enforcement than is imposed by applying *Edwards* in the typical single-investigation context.

While all law enforcement officials involved in a single investigation can reasonably be required to be aware that the suspect has requested counsel and to treat him accordingly, it is far more burdensome to require every investigator to determine whether any suspect he questions in custody has previously requested counsel in connection with any unrelated investigation. Moreover, to extend the *Edwards* rule to interrogations occurring in the course of unrelated investigations would deprive the police of an extremely valuable investigative resource—interrogation—without requiring the suspect to indicate in any way that he wishes counsel in connection with the new investigation. Before shutting the door on all such investigative opportunities, we submit that it is not too much to ask that the suspect at least indicate that he wants the door to be shut.

ARGUMENT

THE *EDWARDS* RULE SHOULD NOT BE EXTENDED TO INTERROGATIONS CONDUCTED IN THE COURSE OF SEPARATE INVESTIGATIONS

The rule adopted by this Court in *Edwards* v. *Arizona*, 451 U.S. 477 (1981), prohibits the police from questioning a suspect who has invoked his right to counsel until the suspect obtains counsel, unless the suspect himself initiates discussions with the police. The *Edwards* case and the cases that have applied the *Edwards* rule[4] have all involved interrogations relating to a single criminal episode, conducted in the course of a single criminal investigation. The question in this case is whether the rule in *Edwards* should be extended to prohibit law enforcement officials

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[4] See *Connecticut* v. *Barrett*, No. 85-899 (Jan. 27, 1987); *Smith* v. *Illinois*, 469 U.S. 91 (1984); *Solem* v. *Stumes*, 465 U.S. 638 (1984); *Oregon* v. *Bradshaw*, 462 U.S. 1039 (1983); *Wyrick* v. *Fields*, 459 U.S. 42 (1982).

from questioning a suspect if the suspect has previously invoked his right to counsel in connection with a separate investigation of a different crime. We submit that it should not. Whatever the benefits of the prophylactic rule of *Edwards* as weighed against its costs to effective law enforcement, the benefits are fewer and the costs are significantly greater when the rule is extended to prohibit police interrogations that take place in the course of separate criminal investigations.

1. The concern that underlies the *Edwards* rule is that absent a strict prohibition against renewed interrogation after a suspect invokes his right to counsel, "an accused in police custody [may be] badgered by police officers in the manner in which the defendant in *Edwards* was." *Oregon* v. *Bradshaw,* 462 U.S. 1039, 1044 (1983). That concern is less serious when the suspect is questioned in the course of an entirely separate investigation. In order to justify initiating contact with the suspect, the police must establish that they are in fact conducting a separate investigation. In order to obtain a statement that is admissible at trial, they must obtain a valid waiver of the suspect's right to remain silent and his right to counsel. And, under *Edwards*, they may not initiate further inquiries if the suspect invokes his right to counsel in connection with the second investigation, as he did in connection with the first. To hold that the per se rule of *Edwards* is inapplicable to the initiation of questioning relating to a separate investigation thus does not give the police license to pressure the suspect until he finally gives in and agrees to speak with them.

The extra burden imposed on a suspect by not extending the *Edwards* rule to interrogations that are part of a separate investigation is slight; if the suspect wishes counsel for the new investigation, he must simply assert that right in response to the police questioning. In light of *Edwards*, he will not have been subjected in the original investigation to repeated inquiries about his readiness to

talk to the police, and he will have no reason to doubt that his choice among the options presented by the *Miranda* warnings will be honored. All he is required to do is to advise the investigator that he wishes the assistance of counsel before being questioned in connection with the new investigation.

In a case like *Edwards*, a suspect who requests the assistance of counsel but is then interrogated in spite of his request may assume that the "right" to counsel is not real, or at least that the police have no intention of respecting it. By contrast, in the context of a separate investigation, when a law enforcement officer explains that he is investigating an offense that is unrelated to the offense for which the suspect is being held, there is no reason for the suspect to conclude that if he requests an attorney before answering questions in connection with the new inquiry, his request will be ignored.

The facts of this case illustrate this point. It is reasonably clear that respondent had previously agreed to talk to Officers Quinn and Garrison while knowing that they were unaware of his earlier request for counsel. See 10/17/85 PM Tr. 8 (respondent replied affirmatively to Quinn's inquiry about whether "it was true he was willing to give a statement") and 4/3/86 Tr. 23-24 (prosecutor explains that Garrison inquired of Perez, in respondent's presence, whether respondent had been advised of his rights, and upon being given a simple affirmative answer, then asked respondent whether he wanted to talk). Instead of correcting their misapprehension and informing them that he had requested counsel, respondent simply changed his mind and decided to talk.

Officer Perez, of course, should have told Quinn and Garrison about respondent's request for counsel, and his failure to do so led to the exclusion of respondent's statements from the State's case-in-chief in the prosecution relating to the April 16 burglary. That much was required

by *Edwards*. But the context makes it clear that respondent's failure to reiterate his request for counsel to Detective Cota-Robles, even after Detective Cota-Robles gave respondent complete *Miranda* warnings, could not have been the result of any doubt on respondent's part that the police would honor a request for counsel if one were made. Moreover, Detective Cota-Robles tape-recorded his interview with respondent. That recording provided further assurance, subject to review by a court, that Detective Cota-Robles did not obtain respondent's agreement to talk by "badgering" him, but that respondent's willingness to discuss the April 16 burglary with Detective Cota-Robles was the product of his informed free will. In sum, the facts of this case, which may be fairly representative of cases in which police seek to question a suspect in connection with a separate investigation, demonstrate that the per se rule of *Edwards* is not needed in such cases to protect the suspect from police efforts to induce him to withdraw his prior invocation of counsel.

While *Edwards* is designed to protect the suspect's expressed wishes from being disregarded, it is by no means clear that extending *Edwards* to a case like this one would have that effect. In contrast to a case involving a single offense, the suspect's wishes are not so easily ascertained when different investigations are involved. Where only a single investigation is at issue, it may be unlikely that the suspect will experience an unprovoked change of heart regarding the advantages of speaking to the police without counsel, after he has first concluded that it is in his interest to seek the assistance of counsel. In that setting, when the suspect changes his mind after the police renew contact with him, the Court has concluded that the risk is high that the suspect's decision is the product of police compulsion, whether subtle or overt. On the other hand, where the suspect is faced with a separate investigation of a different crime, his judgment as to the need for counsel in connection with that investigation may reasonably be quite different from his judgment as to the need for counsel in connection with the first investigation. Cf. *United States* v. *Renda*, 567 F. Supp. 487, 490 (E.D. Va. 1983) (Renda was able "to differentiate between crimes he was willing to talk about in the absence of counsel and crimes he was unwilling to talk about in the absence of counsel.").

Even after invoking the right to counsel in connection with one matter, a suspect may have good reasons for wanting to speak with the police about the offenses involved in the new investigation, or at least to learn from the police what the new investigation is about so that he can decide whether it is in his interest to make a statement about that matter without the assistance of counsel. The suspect might wish to provide the police with information that he believes is exculpatory, or he might wish to offer in that case " 'immediate cooperation with the authorities in the apprehension and conviction of others or in the recovery of property [which] would redound to his benefit in the form of a reduced charge.' " *Edwards* v. *Arizona*, 451 U.S. at 491 n.1 (Powell, J., concurring in the result) (quoting *Michigan* v. *Mosley*, 423 U.S. 96, 109 n.1 (1975) (White, J., concurring in the result)). The difference in the suspect's desires with respect to the two investigations may turn on very real differences in the nature of the two investigations. To take the most obvious example, the suspect may know he is guilty of the crime involved in the first investigation, but not guilty of the crime involved in the second. If *Edwards* is applied to such cases, the police will not be free even to discuss the facts of the second investigation with the suspect in the absence of counsel—something that may actually work to the suspect's disadvantage by denying him the chance to resolve the second case quickly if he has an alibi or some other ready answer to the police suspicions.

The Court has recognized the risk that "a blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances, would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigation activities, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests" (*Michigan* v. *Mosley,* 423 U.S. at 102). *Edwards* prevents investigators from discussing their case with a suspect once he has requested the assistance of counsel, unless the suspect himself initiates the discussion. While *Edwards* is based on the view that this ban on communication is necessary to prevent the risk that the suspect will be badgered into relinquishing his rights, it does have the disadvantage, from the suspect's point of view, of depriving him of information that may be relevent to his decision whether to provide his side of the story to the investigators. When a single investigation is involved, the suspect is aware that the investigation is proceeding, and he can initiate renewed communications if he wishes. But extending the *Edwards* rule to a new and unrelated investigation deprives the suspect of knowledge of the very existence of the new investigation, so that there may be no chance for him to exercise that choice.

2. Not only is the risk that suspects will be coerced into abandoning their Fifth Amendment rights considerably smaller where independent investigations are involved than in the situation typified by the *Edwards* case, but the interference with law enforcement activities that would result from applying the *Edwards* rule in this context is significantly greater than in cases like *Edwards*. It is one thing to require the officers who are involved in the investigation that led to the arrest and the administration of the *Miranda* warnings to be aware of the suspect's response to those warnings, and to require them to respect

his decision not to discuss the case in the absence of counsel. It is quite another matter to require officers who are pursuing different investigations, perhaps even for different prosecutorial entities, to determine whether a suspect has previously requested the advice of counsel in any other investigation in which he may have been implicated. The sort of careful record checking that is appropriate in title searches is simply out of place in the context of a fast-breaking criminal investigation. Cf. *Oregon* v. *Elstad,* 470 U.S. at 316 ("In many cases, a breach of *Miranda* procedures may not be identified as such until long after full *Miranda* warnings are administered and a valid confession obtained."). Even if the officer conducting the new investigation does attempt to determine whether the suspect has asserted his right to counsel, that information may not be readily available or entirely reliable because of inadequacies in the custodian's recordkeeping. It is not reasonable to require an official of one jurisdiction to rely on the recordkeeping capabilities of an entirely different jurisdiction to protect the integrity of his investigation.[5]

We do not suggest that the admissibility of the fruits of the second interrogation should turn on whether the second investigator was aware of the original request for counsel. That approach puts a premium on ignorance, and thus encourages a lack of communication between investigating officials. It also ignores the basis for the *Miranda* warnings—to protect the suspect's right to choose whether he wishes to speak to the authorities with-

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[5] In this case the two investigations were both conducted by the Tucson police, although the district court did find that Cota-Robles, whose investigation was penalized, did "nothing wrong" (4/3/86 Tr. 50). We are particularly concerned, however, with the situation where federal investigators—from the FBI or the DEA, for example—may wish to interrogate suspects who are being held in state or local custody. In that situation, no purpose is served by penalizing the federal investigation for inadequacies in local recordkeeping.

out counsel. Instead, we believe the correct analysis recognizes that the separate investigation presents the suspect with a new situation, in which he may wish to make a different choice about whether to consult with counsel before he speaks. Cf. *Michigan* v. *Mosley*, 423 U.S. at 111 (White, J., concurring in the result). In that setting, the prospect that his choice will be different is sufficient to justify a simple inquiry to ascertain his wishes.

We also do not suggest that *Edwards* is inapplicable any time the new interrogation concerns an offense different from the one for which the suspect was originally arrested. Several courts have rejected a "separate offenses" limitation on *Edwards* on the ground that such a limitation can be manipulated by the investigators: "To rule otherwise might encourage law enforcement officers to select minor charges as a basis for an arrest, when major charges could be brought, in order to have more than one 'shot' at an arrestee who at first refuses to talk and asks for counsel." *State* v. *Taylor*, 56 Or. App. 703, 707-708, 643 P.2d 379, 382 (1982); accord *State* v. *Routhier*, 137 Ariz. at 97, 669 P.2d at 75; *Boles* v. *Foltz*, 816 F.2d 1132, 1141 (6th Cir. 1987) (Gibson, J., dissenting); *United States ex rel. Karr* v. *Wolff*, 556 F. Supp. 760, 765 (N.D. Ill. 1983), vacated on other grounds, 732 F.2d 615 (7th Cir. 1984). See also *United States ex rel. Espinoza* v. *Fairman*, 813 F.2d 117, 125-126 & n.7 (7th Cir. 1987); *United States* v. *Renda*, 567 F. Supp. 487 (E.D. Va. 1983); *Radovsky* v. *State*, 296 Md. 386, 464 A.2d 239 (1983); *People* v. *Hammock*, 121 Ill. App. 3d 874, 460 N.E.2d 378 (1984), cert. denied, 470 U.S. 1003 (1985). Our position does not turn on the fact that the new interrogation relates to a different crime, but on the fact that it is part of an independent investigation. The "independent investigation" limitation on *Edwards* affords no such opportunity for prosecutorial manipulation, and where the subsequent interrogation has occurred in the course of an independent investigation, the courts have

generally refused to apply the *Edwards* rule. *State* v. *Willie*, 410 So. 2d 1019, 1026-1027, 1028 (La. 1982); *State* v. *Harriman*, 434 So. 2d 551, 553-554 (La. Ct. App. 1983); *McFadden* v. *Commonwealth*, 225 Va. 103, 300 S.E.2d 924, 927 (1983); *State* v. *Cornethan*, 38 Wash. App. 231, 236, 684 P.2d 1355, 1359 (1984). See *State* v. *Newton*, 682 P.2d 295, 298 (Utah 1984) (separate investigation; counsel provided before second inquiry).

In weighing the costs of extending the *Edwards* rule to cases involving independent investigations, it is important to keep in mind the vital role of police interrogation in furthering law enforcement. As this Court has recognized, " 'the need for police questioning as a tool for effective enforcement of criminal laws' cannot be doubted. Admissions of guilt are more than merely 'desirable'; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran* v. *Burbine,* 475 U.S. 412, 426 (1986) (citations omitted); see also *Oregon* v. *Elstad,* 470 U.S. at 305; *United States* v. *Washington,* 431 U.S. 181, 186-187 (1977); *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 225 (1973). Because of the severe costs it would impose on law enforcement, any rule that forbids police interrogation bears a heavy burden of justification. While the Court concluded that the problem at issue in *Edwards* was sufficiently serious to carry that burden, the problem presented in the present context is not. Accordingly, in light of the costs to law enforcement, this Court should refuse to extend the prophylactic rule of *Edwards* to a class of cases like this one, which does not pose the risk that led to the fashioning of the rule.

This Court has followed a similar approach in applying *Miranda* and *Edwards* in other contexts. Because *Miranda* and *Edwards* establish prophylactic rules and do not directly enforce constitutional prohibitions, the Court has

weighed the benefits of applying those rules against their costs each time it has considered whether to apply the rules to a new class of cases. See, *e.g., New York* v. *Quarles,* 467 U.S. 649, 657 (1984); *Oregon* v. *Elstad,* 470 U.S. at 308-309; *Michigan* v. *Tucker,* 417 U.S. 433, 450-451 (1974). For example, in *Connecticut* v. *Barrett,* No. 85-899 (Jan. 27, 1987), slip op. 5, the Court pointed out that the *Edwards* rule, like other aspects of *Miranda*, "is not itself required by the Fifth Amendment's prohibition on coerced confessions, but is instead justified only by reference to its prophylactic purpose." In the situation presented in that case—where the suspect asked for counsel before making a written statement, but agreed to make an oral statement without counsel—the Court concluded that the benefits of applying the rule in *Edwards* did not outweigh its costs. The Court therefore held that *Edwards* did not bar oral interrogation, even though the suspect had requested counsel for other purposes. The same analysis should apply in this case, where respondent invoked counsel only with respect to the April 16 burglary.

In previous cases, this Court has rejected suggestions that the admissibility of a suspect's statements in an *Edwards*-type case should be based on a consideration of all the factors in the particular case. See, *e.g., Oregon* v. *Bradshaw,* 462 U.S. at 1048-1049 (Powell, J., concurring in the judgment); *Edwards* v. *Arizona,* 451 U.S. at 487-488 (Burger, C.J., concurring in the judgment); and *id.* at 491 (Powell and Rehnquist, JJ., concurring in the result). Instead, the Court has preferred the safeguards of a "bright-line" rule that guards against even the possibility of the subtle coercive tactic of wearing down the suspect's will to resist by repeated inquiries. See, *e.g., Smith* v. *Illinois,* 469 U.S. at 98. But where the subsequent police inquiry relates to an investigation that is independent of the one in which the request for counsel was made, the justification for that "bright-line" rule is greatly reduced.

Therefore, once it is clear that the police inquiry at issue relates to an investigation separate from the one in which the suspect requested counsel, the Court should not apply the special rule of *Edwards*, but should rely on the traditional test for waiver. If the government can satisfy its burden of showing that the suspect made a knowing and intelligent waiver of his right to the assistance of counsel in connection with the new investigation, the statements made by the suspect in the course of that investigation should be admitted.

Excluding statements relating to charges that arise out of the initial investigation, while admitting statements relating to charges that arise out of an independent, second investigation, is consistent with this Court's approach in the Sixth Amendment context, see *Maine* v. *Moulton*, 474 U.S. 159 (1985). In *Moulton*, an informant elicited statements from an indicted defendant that were relevant both to the offenses for which the defendant had been indicted and to other, uncharged offenses. The Court held that the Sixth Amendment barred the admission of the defendant's statements in connection with the charges that had already been initiated. The Court refused, however, to bar the use of the statements in any later prosecutions that might be brought in connection with the offenses that were not already the subject of formal charges at the time the statements were made. See 474 U.S. at 179-180 & n.15.

The same principle should apply here by analogy. The statements obtained in the course of the investigation of the April 16 burglary were suppressed because of the violation of *Edwards* in the course of that investigation. Those statements were held to be inadmissible, except for impeachment purposes, in the trial on those charges, and if offered at the trial on the April 15 burglary, they would be inadmissible in that proceeding as well. On the other hand, the statements respondent made in the course of the independent investigation should be admissible in the trial of

the charges that were the subject of that investigation—the charges arising from the April 15 burglary. Just as the rule of exclusion under the Sixth Amendment does not apply with respect to matters that have not yet been made the subject of a formal charge, the rule of exclusion under the principles of *Miranda* and *Edwards* should not be applied with respect to an investigative proceeding in which the suspect has not yet requested the assistance of counsel.

CONCLUSION

The judgment of the Arizona Court of Appeals, Division Two should be reversed.

Respectfully submitted.

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No. 87-354

In The
Supreme Court of the United States
October Term, 1987

THE STATE OF ARIZONA,
Petitioner,

v.

RONALD WILLIAM ROBERSON,
Respondent.

On Writ of Certiorari to the
Supreme Court of Arizona

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, AND THE NATIONAL SHERIFFS' ASSOCIATION, IN SUPPORT OF THE PETITIONER.

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This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Bruce M. Ferg, Arizona Assistant Attorney General, Counsel for the Petitioner, and Robert L. Barrasso, Esq., Counsel for Respondent. Letters of Consent of both parties have been filed with the Clerk of this Court.

INTEREST OF AMICI

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* eighty-one times in the Supreme Court of the United States, and thirty-six times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 14,000 members in 67 nations. Through its programs of training, publications, legislative reform and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

The National District Attorneys Association, Inc. (NDAA), is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publications, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

The National Sheriffs' Association (NSA), is the largest organization of sheriffs and jail administrators in

America, consisting of over 40,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among the Nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting all rights guaranteed under the Constitution.

Amici are national and state associations, and their perspective is broad. This brief concentrates on policy issues concerning the waiver of rights by persons subject to law enforcement interrogation, and the need to give law enforcement agencies clear guidance with respect thereto. Although Petitioner is clearly represented by capable and diligent counsel, no single party can completely develop all relevant views of such issues as these. We speak on behalf of law enforcement officers and administrators nationally.

ARGUMENT

THE RULE OF *EDWARDS V. ARIZONA*, THAT POLICE OFFICERS MAY NOT INITIATE INTERROGATION OF AN IN-CUSTODY SUSPECT AFTER INVOCATION OF RIGHT TO COUNSEL, IS NOT APPLICABLE TO A CASE IN WHICH THE SUSPECT, HAVING INVOKED HIS RIGHTS IN REGARD TO A CRIME THEN UNDER INVESTIGATION, LATER CONSENTS TO QUESTIONING ABOUT AN UNRELATED CRIME, CONDUCTED BY OTHER OFFICERS WHO ARE IGNORANT OF THE PRIOR INVOCATION OF RIGHTS AND WHO COMPLY COMPLETELY WITH THE REQUIREMENTS OF *MIRANDA V. ARIZONA*.

In this case the Arizona Court of Appeals, Division Two, in an unpublished opinion, *State v. Roberson*, 2 CA-CR 4474-5 (Az. Ct. App., Mar. 19, 1987), held that a coercive environment surrounded the Respondent (hereinafter called the "defendant"), who was continuously in police custody from the time of asserting his Fifth Amendment right to counsel through the time he was questioned outside an attorney's presence on a crime other than the one for which he was originally taken into custody, that such environment never dissipated, and, therefore, even though the defendant did not request an attorney after being advised of his rights prior to questioning on the second crime, the trial court properly suppressed his statements.

The case squarely raises the question of whether the rule of *Edwards v. Arizona*, 451 U.S. 477 (1981), that police officers may not initiate interrogation of an in-custody suspect after invocation of his right to counsel, is applicable to a case in which the suspect, having invoked his rights in regard to a crime then under investigation, later consents to questioning about an unrelated crime,

conducted by other officers who are ignorant of the prior invocation of rights and who comply completely with the requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966).

Amici will not duplicate the case law analysis presented by the Petitioner in this case; instead, we concentrate upon issues of policy that concern our law enforcement constituency.

The position urged by defendant lacks support from the rule established in *Edwards v. Arizona*. In that case the second attempt of the police to question Edwards was for the *same offense* for which he had earlier invoked his rights under *Miranda v. Arizona*. In the instant case the police questioning that is in dispute concerned a crime *totally unrelated* to the one for which he had claimed his right to counsel. The legitimacy of the latter questioning, regarding which the suspect had received and waived his *Miranda* rights, is supported by sound reasons and prior authority of this Court.

In *Edwards*, the defendant, while a suspect in a robbery-murder, had been taken into custody and given the *Miranda* warnings. His initial response was that he understood his rights and was willing to submit to police questioning. However, after being told that another arrestee had implicated him, Edwards denied involvement, and gave a taped statement in which he presented an alibi. He then sought to "make a deal." When told that his questioner was unable to deal, Edwards stated that he wanted an attorney, at which point the interrogation ceased. The next morning two other detectives, colleagues of the original questioners, sought to question Edwards. They, too, informed him of his rights and he stated his willingness to talk, but that he first wanted to hear the tape recorded statement of the alleged accomplice. After hearing part of the tape, Edwards said that he would make a statement provided

it would not be taped. Then, when told that a recording was not necessary, he confessed. Upon trial he was convicted, and his conviction was affirmed by the Arizona Supreme Court, which held that he had waived both of his *Miranda* rights. In reversing that ruling, this Court held that in order for a waiver to be valid, Edwards must have *initiated* the statements he ultimately gave the police, a factor the Court found to be lacking. Three Justices concurred in the result only, with two of them objecting to what they considered "an undue, and undefined emphasis on a single element: 'initiation'." 451 U.S. at 492.

Irrespective of whatever consideration may be accorded the reasoning of the Court in *Edwards,* it does stand for the proposition that the waiver of rights claimed under *Miranda* must be initiated by the suspect. One fact that is clear, however, is that the *Edwards* case involved an interrogation *about the same offense regarding which the suspect had earlier asserted his Miranda rights.*

The basic issue in the instant case was resolved, we submit, by this Court's decision in *Michigan v. Mosley,* 423 U.S. 96 (1975). In *Mosley,* a police detective in the Detroit Police Department's robbery detail arrested the defendant as a robbery suspect. After he received *Miranda* warnings the arrestee stated that he did not want to talk. No interrogation was attempted. More than two hours later, however, another detective from the Detroit homicide unit wanted to question Mosley regarding an unrelated murder. This time, following a second issuance of the warnings, Mosley waived his rights. At first he denied any involvement, but upon being told that an alleged accomplice had named him as the killer, Mosley confessed. A majority of this Court, with two Justices in dissent, ruled that there was no *Miranda* violation, and that the confession was properly

held admissible as evidence.

Although *Mosley* was a case in which the suspect had asserted his right to silence, and did not claim a right to counsel, the principle established in that case is equally applicable to the present one. As *amici* pointed out in their brief in another case now pending before this Court, *Patterson v. Illinois,* #86-7059, __ U.S. ___, 108 S. Ct. 227 (1987), there is, in the context of *Miranda,* no higher priority to be accorded a claim to counsel over a claim to remain silent. In fact, as we stated in that brief, one of the strongest supporters of *Miranda,* Professor Yale Kamisar, has considered such a professed distinction to be a "baffling" one. As he correctly pointed out, the Court's concern in *Miranda* was the protection of the Fifth Amendment's self-incrimination privilege, with only an auxiliary consideration accorded the right to counsel at a police interrogation. See, 34 Cr.L. 2101 (1983), a comment by Professor Kamisar during a "Syposium on Supreme Court Review and Constitutional Law."

In other words -- and contrary to a generally prevailing misconception, even within the legal profession itself -- the inclusion of the right to counsel as one of the *Miranda* warnings was *not* in deference to the Sixth Amendment right itself, but only to bolster the self-incrimination privilege. Both rights are equally subject to a suspect's waiver.

There are sound reasons in support of the position that the police should not be foreclosed from investigating, by means of lawful interrogation procedures, crimes unrelated to the one for which a suspect has invoked his rights under *Miranda*. This view was succinctly and cogently expressed by Justice Potter Stewart when he stated, in *Michigan v. Mosley,* 423 U.S. at 103, that "a blanket prohibition against the taking of

voluntary statements or a permanent immunity from further interrogation would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity."

Attempts to extend *Miranda* beyond its already intolerable limits never cease to end. One recent illustration is the effort, fortunately a futile one, that was made to persuade this Court in *Colorado v. Spring*, __ U.S. __, 107 S. Ct. 851 (1987), that a waiver of *Miranda* rights was invalid unless the suspect was informed of all the crimes about which he might be questioned. With only two dissents, this Court rejected that contention. As some of the *amici* in the present case pointed out in their brief in *Spring*, an acceptance by this Court of the rule the Colorado appellate courts had adopted would have imposed unconscionably absurd practical difficulties upon the essential police interrogation process.

Another recent illustration of proposed absurdities of *Miranda* extensions is the case of *Connecticut v. Barrett*, __ U.S. __, 107 S. Ct. 828 (1987), in which this Court was urged, unsuccessfully, to hold that a warned suspect's *oral* confession should be rejected because he subsequently refused to sign a *written* one without counsel being present. The Court made clear that the rule in *Edwards*, as is true of *Miranda* itself, is *not* constitutionally required, but is merely a rule adopted to avoid coercion prohibited by the Fifth Amendment. The Court approved, in effect, the concept of selective invocation of rights by defendants in police custody, as took place in the instant case.

> To this end, the *Miranda* Court adopted prophylactic rules designed to insulate the exercise of Fifth Amendment rights from the government "compulsion, subtle or otherwise," that "operates on the individual to

> overcome free choice in producing a statement after the privilege has been once invoked." *Miranda, supra,* 384 U.S., at 474, 86 S. Ct., at 1627. See also *Smith,* 469 U.S., at 98, 105 S. Ct., at 4943; *Oregon v. Bradshaw,* 462 U.S. 1039, 1044, 103 S. Ct. 2830, 2834, 77 L. Ed. 2d 405 (1983). One such rule requires that, once the accused "states that he wants an attorney, the interrogation must cease until an attorney is present." *Miranda,* 384 U.S., at 474, 86 S. Ct., at 1627. See also *Edwards,* 451 U.S., at 484, 101 S. Ct., at 1884. *It remains clear, however, that this prohibition on further questioning--like other aspects of* Miranda--*is not itself required by the Fifth Amendment's prohibition on coerced confessions, but is instead justified only by reference to its prophylactic purpose.* (emphasis added). 107 S. Ct. at 832.

Mention may also be made of what was sought in the 1986 case of *Moran v. Burbine*, __ U.S. __, 106 S. Ct. 1135, 1141-1142 (1986), in which Justice Sandra O'Connor, speaking for the majority of the Court, said in response to the argument of defense counsel, "[e]vents occurring outside the presence of the suspect and entirely unknown to him can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right," to which the Justice added, "... we have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self interest in deciding whether to speak or stand by his rights."

We urge that the Court not impose upon law enforcement the roadblock defendant seeks to establish. We also respectfully suggest that in its opinion the Court give some indication that with regard to future proposed

extensions of *Miranda's* coverage, "enough is enough." This may discourage further erosions upon the Court's valuable time until, hopefully, it may decide to completely dispense with the unwarranted aspects of the *Miranda* mandate itself.

CONCLUSION

Amici submit that the judgment of the court below should be reversed on the basis of the law and sound judicial policy.

Respectfully submitted,

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